FEDERAL MARITIME COMMISSION

DOCKET NO. 72–46

AGREEMENT NO. 57–96, PACIFIC WESTBOUND CONFERENCE — EXTENSION OF AUTHORITY FOR INTERMODAL SERVICE

ORDER

September 15, 1976

The Commission instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916, to determine whether Agreement No. 57–96 (Agreement), wherein the members of the Pacific Westbound Conference (PWC) agree to fix intermodal rates, should be approved, disapproved or modified.[1] Although others were granted leave to intervene in these proceedings, only Seatrain Lines Inc. (Seatrain), Far East Conference (FEC) and Hearing Counsel filed briefs and participated in this proceeding.

After investigation, hearing, and oral argument, the Commission, on July 8, 1975, issued its Report and Order approving the Agreement for 18 months on condition that the Agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well, until such time as the Conference implements the authority granted herein by the filing of appropriate tariffs. Approval of the Agreement was further conditioned upon the submission of the modified Agreement within 60 days of the date of the Order, *i.e.*, September 8, 1975. On September 8, 1975, the Commission suspended its July 8th Order.

PWC has now filed a modification of Agreement No. 57–96, which complies with our July 8th Order and a motion requesting that the Commission vacate its Order of September 8th.

THEREFORE, IT IS ORDERED, That the Commission's Order of Suspension of September 8, 1975, is hereby vacated.

[1] A protest to the Agreement and request for hearing was filed by Seatrain Lines, Inc. a named Respondent.

IT IS FURTHER ORDERED, That Agreement No. 57–96, as modified, is approved effective this date.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–46

AGREEMENT NO. 57–96, PACIFIC WESTBOUND CONFERENCE EXTENSION OF AUTHORITY FOR INTERMODAL SERVICES

Agreement No. 57–96, granting the Pacific Westbound Conference authority over intermodal rates is approved pursuant to section 15 of the Shipping Act, 1916, subject to certain conditions and limitations.

No modification of Agreement No. 57–96 is warranted in order to restrict the rights of members to vote on matters related to intermodal traffic and tariffs to only those lines who offer and participate in such services, or in order to prohibit the application of conference self-policing procedures to independent intermodal tariffs published by any of its member lines.

Edward D. Ransom and *Joshua Bar-Lev* for Pacific Westbound Conference, respondent.

Marvin J. Coles and *Neal M. Mayer* for Seatrain International SA, respondent.

Elkan Turk, Jr., for Far East Conference, intervenor.

J. Kerwin Rooney for Port of Oakland, intervenor.

Lawrence F. Daspit and *G. B. Perry* for New Orleans Traffic and Transportation Bureau, Board of Commissioners of the Port of New Orleans and Galveston Wharves, intervenor.

Sam H. Lloyd for Georgia Ports Authority, intervenor.

George E. Strange for Houston Port Bureau, Inc., intervenor.

Donald J. Brunner and *C. Douglas Miller* as Hearing Counsel.

REPORT

September 15, 1976

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett and Clarence Morse, *Commissioners*).

The Commission instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916, to determine whether Agreement No. 57–96, (Agreement) which generally would grant the Pacific Westbound Conference (PWC)authority over intermodal rates, should be approved, disapproved or modified.[1] While the Far East Conference (FEC), and the

[1] A protest to the Agreement and request for hearing was filed by Seatrain Lines, Inc.

Ports of Houston, Baton Rouge, New Orleans, Oakland, and San Francisco as well as the Georgia Ports Authority have all been granted leave to intervene in this proceeding, only FEC has filed briefs. Seatrain Lines, Inc. (Seatrain), a named respondent, and Hearing Counsel have also participated and filed briefs in this proceeding.

Hearings have been held and Administrative Law Judge Stanley M. Levy has issued an Initial Decision disapproving the proposed Agreement to which exceptions and replies to exceptions have been filed. We heard oral argument.

FACTS

The facts and background relevant to the present application as developed in this proceeding are as follows.

The Pacific Westbound Conference operates pursuant to Agreement No. 57 in the trade from the Pacific Coast ports of the United States to ports in the Far East. PWC is currently composed of 21 regular members and four associate members. Thirteen of the regular members are also members of the Far East Conference.

FEC is a conference of 19 member lines providing an all water service from U.S. East Coast ports to ports in the Far East. FEC publishes a tariff naming local rates only, i.e. port-to-port rates.

From its inception, PWC has published both local and overland rates in its tariff.[2] The overland tariff is applicable to cargo originating east of the Rocky Mountains which at the time of the hearing in this proceeding moved under an inland carrier through export bill of lading by inland carriers who have an agreement for interchange of cargo with PWC.

The local tariff of PWC covers all cargo by PWC members in the PWC trade not covered by overland rates. Generally, this is cargo which originates in the local territory west of the Rocky Mountains, but also includes cargo which in fact originates in the overland territory but has not met the requirements for the overland tariff. Local cargo is moved to Pacific Coast ports at exporter's expense.

PWC and FEC generally compete for cargo moving from the large industrial centers in the midwest.[3] The aggregate of inland and ocean rates covered by PWC/OCP service is comparable to the aggregate of inland rates to the port of loading and FEC port-to-port rates. In order to rationalize this competition they have entered into an agreement (FMC No. 8200–2) which permits them to meet and discuss conference rates and rules. Although they may reach agreement on the subjects discussed,

[2] Overland rates, unlike intermodal rates which are joint land/ocean rates, are port-to-port rates. PWC's use of an overland tariff was approved by the Commission in *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969),and is designed, as the Commission explained therein:

> . . . to meet the competition of ocean carriers operating out of Gulf and Atlantic Coast ports to and from the same foreign ports with respect to cargo originating in or destined for the Central or Midwest United States. For such cargo, the effect of overland/OCP tariffs is to make the aggregate freight charge for inland rail plus ocean transportation via the Pacific Coast gateway competitive with such aggregate charge via the Atlantic or Gulf gateway.

[3] PWC does not draw a substantial amount of overland cargo from areas within 200 miles of East and Gulf Coasts.

each conference has a right of independent action. Nothing in the Agreement permits discussion of the relationship between the PWC overland rates and the FEC local rates.

PWC has not in the past assumed jurisdiction over any intermodal rates, whether interior or minibridge. While at least 14 member lines of PWC have individually filed minibridge tariffs,[4] no PWC member has yet filed an *interior* intermodal tariff in the Conference trade.

Nine of the 13 lines which are common members of PWC and FEC have minibridge tariffs on file with the Commission.

Seatrain operates an all-water service from California ports and ports in the Far East and, as such, is a member of PWC. While Seatrain carries both local and overland cargo under the conference tariff, it is not a major carrier of overland cargo when compared to other PWC carriers.[5] Instead, it has concentrated its efforts in offering minibridge services.

In order to strengthen its position in the trade, Seatrain decided it was necessary to penetrate markets on the Atlantic and Gulf Coasts. Since it did not provide direct all water service from Atlantic Coast ports, it entered into arrangements with several railroads for the inland carriage of cargo between Atlantic and West Coast ports. After reaching an agreement with the railroads, Seatrain published a minibridge tariff naming joint through rates from Atlantic and Gulf Coast ports to the Far East. Rates shown in the tariff include rail transportation from Atlantic and Gulf ports to West Coast ports and water transportation from West Coast ports to the Far East.[6] The level of these joint through rates is basically the same as the port-to-port rates established by FEC which serves the Atlantic and Gulf Coasts.[7]

Since minibridge is priced at parity with FEC, it is capable of drawing cargo from all of the areas which have traditionally been served by the FEC. In fact, however, Seatrain is drawing most of its minibridge cargo from areas within 200 miles of East and Gulf Coast ports.

Seatrain characterizes the unit train as an important element of its overall minibridge service, although only about 28 percent of all Seatrain's Atlantic and Gulf Coast traffic destined for the Far East moves via unit train. Nevertheless, Seatrain has been successful in penetrating the Atlantic Coast markets through the use of minibridge. During the last three months of 1972, Seatrain handled 539 minibridge containers westbound. The average revenue to Seatrain for minibridge traffic moving from the Atlantic Coast after the rail division is paid is $1,853.00 per 40-

[4] Minibridge service is defined as receipt of the cargo by an intermodal carrier at a port area rail head for transportation by land, and thereafter transportation by sea, from a port on the opposite coast. Receipt of cargo other than at a port area rail head is denominated interior intermodal service. Both minibridge and interior intermodal rates are joint through rates.

[5] At the time of the hearings in this proceeding, Seatrain was only carrying approximately 15 containerloads of overland cargo on its vessels per month.

[6] Seatrain is generally recognized as being the leader in the development of intermodal minibridge services. In addition to its minibridge service from Atlantic and Gulf Coasts to the Far East, Seatrain also offers minibridge services between West Coast ports and Europe and between New York and Hawaii.

[7] Rates shown in all 14 minibridge tariffs are generally in parity with FEC rates.

foot container. The averaage revenue to the vessel for minibridge cargo moving from the Gulf Coast after the rail division is paid is $1,635.00 per container. In comparison, the average net to the vessel carried under PWC's local tariff is between $1,000.00 and $1,100.00.

In order to obtain the most favorable division of revenues from the participating rail carriers under its minibridge service, Seatrain has utilized the unit train concept. A unit train of up to 60 cars carrying up to 120 containers departs once a week in each direction from North Bergen, New Jersey, and Richmond/Los Angeles, California.

The unit train is able to move cargo between North Bergen and Richmond/Los Angeles in approximately 4½ to 5 days. Seatrain's water service from the West Coast to Japan takes approximately 10 days. Thus, Seatrain's minibridge service to Japan compares favorably with the 16-day all-water service offered by five Japanese member lines of the FEC.[8] It is faster than the all-water service provided by the remaining FEC member lines which require from 21 to 28 days transit time.

Seatrain's minibridge shipments which are not placed aboard unit trains take approximately five to six days to cross the United States. Although this service to the Far East is slightly slower than that of the five Japanese lines, it is faster than the all-water services offered by a number of FEC carriers.

Since the publication of Seatrain's minibridge tariff, 13 other members of PWC have filed similar tariffs, but what little information is available in this record indicates that they are moving little traffic under them. None is using unit trains.

During the year preceding the hearings in this proceeding, Seatrain had reduced rates on approximately 12 commodities below the rates established by FEC. The record indicates that Seatrain lowered rates on these commodities because shippers complained that they could not ship the commodities at the rate levels established by FEC.[9] There is no evidence that PWC has been forced to reduce its overland rates in order to meet minibridge competition.

AGREEMENT NO. 57–96

Agreement No. 57–96 would permit the PWC to (a) broaden its geographic scope to include inland points in the United States and inland points in various Asian nations; (b) in effect, establish port-to-point, point-to-point, point-to-port through and joint rates "with inland connecting carriers or associations thereof" in addition to its conventional port-to-port rates; (c) allow member lines to "publish and utilize individual intermodal tariffs covering only traffic from points at Atlantic and Gulf ports and adjacent land carriers terminals" to destination ports or points

[8] These five Japanese lines, Mitsui, Japan Line, K Line, NYK and Yamashita-Shinnihon, belong to a Commission-approved space charter agreement (Agreement No. 9975).

[9] FEC statistics do indicate, however, that *some* traffic nevertheless moved at those FEC rate levels.

until such time as the PWC "adopts and effectuates a tariff or tariffs which includes such traffic" at which time the individual tariffs must be cancelled; unless "by the Conference action required to adopt or amend tariffs, such individual intermodal tariffs or parts thereof are permitted to remain in effect"; and (d) subject the individual intermodal tariffs to "all applicable provisions of this Agreement No. 57, as amended, the Appendix thereto, the Conference Administrative Regulations, and Rules and Conditions."

THE INITIAL DECISION

The Initial Decision rendered by Administrative Law Judge Stanley M. Levy would withhold approval of Agreement No. 57-96 on the grounds that (1) the record fails to demonstrate any transportation need for the intermodal authority granted therein to the PWC, and (2) the public interest does not require approval of such agreement at this time. It recommends that the proceeding not be discontinued but, rather, that jurisdiction be retained, so that the Commission may act expeditiously if there is brought to the Commission's attention evidence demonstrating that there is a transportation need for such conference authority and that the grant of such authority would not be contrary to the public interest. On other issues raised in the Commission's Order instituting this proceeding, Judge Levy ultimately concludes that:

No modification of Agreement No. 57-96 is warranted nor could it be permitted in order to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC.

Agreement No. 57 should not be modified to restrict the rights of members to vote on matters relating to intermodal traffic and tariffs.

DISCUSSION AND CONCLUSIONS

Exceptions to the Administrative Law Judge's Initial Decision have been filed by PWC, FEC and Hearing Counsel. Replies to exceptions have been filed by PWC, FEC, Seatrain and Hearing Counsel.

Generally speaking, PWC challenges Judge Levy's ultimate conclusion that Agreement No. 57-96 should not be approved. In so doing, PWC has taken exception to virtually every conclusion of law and finding of fact leading to the Presiding Officer's ultimate conclusion.

FEC largely duplicates the exception of PWC with regard to the burden of justifying inland intermodal authority. In addition, FEC reargues the contention that it, rather than PWC, should be given authority over minibridge.

Seatrain strongly supports Judge Levy's Initial Decision as being "fully supported by substantial, reliable and probative evidence in the record" and urges the Commission to adopt it as its own. In so doing, Seatrain would reject every exception which directly or indirectly supports the approval of Agreement No. 57-96.

While Hearing Counsel believe that Judge Levy has applied the correct standards to determine the approvability of the Agreement, they disagree with the ultimate conclusion reached. They submit that the evidence of record supports the approval of Agreement No. 57-96 with certain limitations.

For reasons set forth below, we are approving Agreement No. 57-96, granting PWC authority over intermodal tariffs for a period of 18 months, without prejudice to a timely

petition for its extension, on the condition that the Agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the Conference implements the authority granted it herein by the filing of appropriate tariffs.[10] Further, we find that (1) the self-policing provisions of Conference Agreement No. 57 are applicable to independent intermodal tariffs published by any member of PWC, and (2) Agreement No. 57 should not be modified to restrict the rights of Conference members to vote on matters relating to intermodal traffic and tariffs.

Approval of Agreement No. 57-96

The major issue to be resolved in this proceeding is, of course, whether Agreement No. 57–96, which in effect would extend PWC authority over intermodal through joint rate transportation from any place in the United States to any port or point in PWC Far East destination countries for cargo loaded on PWC member line vessels at West Coast ports, should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. Before addressing ourselves to this question, however, we believe that we should first dispose of the contention advanced by FEC first before the Administrative Law Judge and now before us on exception that it, rather than PWC, is the "appropriate conference to have minibridge ratemaking authority" on traffic moving "westbound . . . from Atlantic and Gulf ports, overland to Pacific Coast ports, and thence by vessel to ports in the Far East."

As the Administrative Law Judge explained in his Initial Decision, FEC's argument that it should control minibridge is predicated on the theory that the loading of goods aboard an oceangoing vessel at a Pacific Coast port is totally irrelevant to the proper location of the ratemaking authority. FEC believes that the more important consideration is that the cargoes involved originate for the most part in areas adjacent to the Atlantic and Gulf ports—ports traditionally served by FEC. Judge Levy rejected FEC's basic contention, concluding that "if any conference is to have authority to promulgate minibridge tariffs for cargo moving from Pacific Coast ports to the Far East it must be PWC and not FEC." Under the circumstances, we believe that the Presiding Officer's assessment and disposition of the matter was entirely proper and well-founded.

Aside from the fact that FEC's proposal is inconsistent with its existing authority and would at the very least require a major amendment to the FEC agreement[11] not presently before us, FEC has failed to present any convincing arguments why it, *rather* than PWC, should be adjudged to be the "appropriate" conference to exercise westbound minibridge jurisdiction to the Far East.

Certainly, we cannot accept on this record FEC's suggestion that it,

[10] This approval is further conditioned upon the submission of the Agreement, modified as required herein, within 60 days of the date of the Order attached hereto.

[11] Although not singularly determinative of the feasibility of FEC's proposal we note that the filing of a minibridge tariff by FEC has, in the past, met with some internal resistance by FEC member lines as evidenced by the fact that when FEC considered amending its organic agreement to include authority over minibridge, it was unable to obtain the unanimous vote required.

rather than PWC, has the greater interest in promoting minibridge because its all-water service is in direct competition with a westbound minibridge service to the Far East where cargo is loaded at West Coast ports. Equally unsupported is FEC's contention that:

> . . . PWC would certainly not be in a position to reconcile the needs of an all-water route from Atlantic and Gulf ports for stability with the motivation of its members to maximize profits or minimize losses on the strictly trans-Pacific route.

FEC's thesis as to why it is the proper conference to assume cljurisdiction over westbound minibridge service out of West Coast ports is both unsubstantiated on this record and directly contrary to the Presiding Officer's finding on this point, to wit:

> [I]f FEC is permitted to establish minibridge tariffs— . . . for shipments out of Pacific clcoast ports—the growth and development of minibridge intermodalism must inevitably be stifled. The *raison d'etre* for FEC is shipping out of Atlantic and Gulf ports to the Far East. Any minibridge service which utilizes Pacific cost ports for shipment to the Far East must necessarily be inimical to FEC members who do not operate out of Pacific coast ports, and to a degree even to the interests of those members who operate out of both coasts. This is so because some members operating out of both coasts may prefer to more fully utilize their all-water service from Atlantic and Gulf ports and limit their carryings from Pacific coast ports to local and overland cargo. Thus there is a strong probability that FEC would establish minibridge rates at a level which prevents minibridge from successfully competing with all-water service.

We have been provided with no sound basis or justifiable reason to disturb this finding. Accordingly, it stands affirmed as does the Presiding Officer's ultimate determination in this matter that if any conference is to be accorded authority over the pertinent minibridge traffic, it should be PWC. We move now to a consideration of whether PWC should be granted the intermodal authority requested.

In denying approval to Agreement No. 57-96, Judge Levy applied the now well recognized principle first enunciated by the Commission in *Investigation of Passenger Travel Agents,* 10 F.M.C. 27, 34-35 (1966) and adopted by the Supreme Court in *F.M.C. v. Svenska Amerika Linien,* 390 U.S. 238, 243 (1968), that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can bring forth such facts as would demonstrate that they are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." Because Agreement No. 57-96 was "one involving intermodal authority," the Presiding Officer determined that it required "the most stringent proof of a serious transportation need." Failing to find "any showing of instability or malpractice" by reason of the absence of conference control over intermodal rates, Judge Levy concluded that "[n]o transportation need can thus be said to exist which would warrant approval of the authority sought."

In challenging the findings and legal conclusions reached by the Administrative Law Judge in denying approval to Agreement No. 57-96, PWC first contends that the subject Agreement need not meet the

standards for approval set out in *Investigation of Passenger Travel Agents, supra,* and *F.M.C. v. Svenska Amerika Linien, supra.* On this point PWC takes the position that:

> Such basic agreements should be approved on the basis of the public benefits which Congress recognized they will render the trade. They do not require an ad hoc showing of imminent and serious transportation conditions.

Notwithstanding its position on the applicability of the *Svenska* doctrine to the present agreement, however, PWC argues that in any event, the Presiding Officer erred in finding that "the record fails to demonstrate any transportation need for . . . [PWC] to have authority over intermodal tariffs."

The positions of the other parties to the proceeding on the matter of the approvability of Agreement No. 57–96 and standards to be applied vary considerably. Whhile not actually advocating that the Judge erred in applying the *Svenska* standard, FEC appears to agree with PWC that demonstration of a precedent serious transportation need is not necessary to the approval of Agreement No. 57–96. In any event, FEC feels that it is unrealistic to require a demonstration of existing rate instability before Agreement No. 57–96 can be approved.

In concurring in Judge Levy's decision, Seatrain argues that PWC misconceives the requirement of section 15 and the *Svenska* decision. In this regard, Seatrain submits that Judge Levy's "conclusions concerning the requirements of the *Svenska* case are correct and his application of the *Svenska* doctrine was fully justified by the record." Seatrain urges the Commission to reject any suggestion that Agreement No. 57–96 is a "run-of-the-mill" rate agreement and as such "presumptively" valid and that the Commission should "serve the function of a mere rubber stamp for conference agreements."

While Hearing Counsel do not suggest that the conference has justified the Agreement as written, they believe that the record supports the approval of an agreement of more limited scope. Specifically, Hearing Counsel feel that the Commission should approve an agreement which (1) *excludes* conference authority over interior intermodal services, thereby limiting conference activity to minibridge; and (2) limits the approval of such agreement to 18 months.[12] Hearing Counsel feel that such an agreement is justified by (1) the need to eliminate multiple tariffs and desirability of uniformity of tariffs, and (2) the potential for rate instability and malpractice which exists in the trade. In support of the latter, Hearing Counsel point out that the trade is now overtonnaged and explains that "It is generally acknowledged that overtonnaging leads to malpractices and rate instability as carriers compete for cargo."

Hearing Counsel would withhold from PWC authority over interior intermodal service as being unjustified by the circumstances in the trade.

[12] The 18-month period, Hearing Counsel believe, "will enable the Commission to identify any difficulties which might develop in the implementation of the agreement and reevaluate the need for conference intermodal authority."

They submit that the transportation circumstances which would justify the authority are not present now, nor is there any strong possibility that they will exist in the near future. Except to the extent Hearing Counsel would deny PWC authority over interior intermodal service, we are in general agreement with the position taken by them.[13]

By restricting and precluding individual member lines from publishing tariffs for through intermodal transportation and fixing the rates and charges at which such transportation will be offered, Agreement No. 57-96 constitutes a clear illegal restraint of trade. As such, the Agreement is "contrary to the public interest" unless it can be shown to be justified or warranted "in terms of legitimate commercial objectives" *F.M.C. v. Svenska Amerika Linien, supra,* p. 244. Thus, the Administrative Law Judge correctly held that before this provision of Agreement No. 57-96 can be approved under section 15, and particularly, the public interest standard thereof, the Conference must demonstrate that the Agreement serves a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose of the Shipping Act.

PWC's argument that conference ratemaking agreements are somehow immune from the approval standards of section 15, including the public interest consideration of *Svenska,* is not only not supported in any prior court or Commission decision but is wholly inconsistent with the clear language of section 15 itself. Section 15 explicitly requires that the Commission subject to its approval requirements "any agreement" which provides for one or more of the activities specifically set forth in the seven categories enumerated therein one of those being the "fixing or regulating [of] transportation rates." As Hearing Counsel have pointed out "there are no exceptions." Nor is there any presumption which automatically exempts from the standards of section 15 all conference ratemaking agreements, or for that matter, any other class or type of agreement or arrangement which otherwise falls within the coverage of that section. PWC's arguments to the contrary while extensive and ingeniously presented and briefed are without basis in law or fact and must be rejected.

Similar arguments by PWC advocating the general inapplicability of section 15 standards to conference ratemaking have already been considered and rejected by the Commission in *Agreement No. 8760-5—Modification of the West Coast United States and Canada/India, Pakistan, Burma and Ceylon Rate Agreement,* 17 F.M.C. ____ (1973). In that case, we expressly ruled that "the applicable standards justifying

[13] Hearing Counsel also object to the procedure adopted by Judge Levy, wherein he would disapprove the Agreement but retain jurisdiction over it by continuing the proceeding. Hearing Counsel view this as a device to ensure that Seatrain cannot vote on any minibridge amendment to PWC's basic agreement which it would otherwise be entitled to do and know of no regulatory purpose to be served by such procedure, especially since the Commission has other tools at its disposal to control malpractices. In view of the manner of our disposition of the issues in this proceeding and our approval of Agreement No. 57-96, we need not address ourselves to the merits or wisdom of the Presiding Officer's recommendation that the Commission should retain jurisdiction over a disapproved agreement.

continued overland ratemaking authority are spelled out in section 15 itself." We would have thought that this unequivocal statement coupled with our general disposition of the issues raised in that proceeding would have laid to rest the matter of applicability of section 15 standards to conference ratemaking. Judging from PWC's reargument of that same matter here and continued insistence that section 15 somehow contemplates an exemption for conference ratemaking agreements, we were obviously mistaken. Lest there be any further misunderstanding, however, we intend to leave no doubt in this opinion that *all* conference ratemaking arrangements are subject to the approval standards of section 15.

Even simple conference ratemaking arrangements involve the antitrust and public interest considerations that were present in *Svenska* and gave rise to the doctrine adopted therein because even simple conference ratemaking arrangements involve the concerted *fixing* of rates which is *per se* unlawful under the antitrust laws unless specifically granted immunity under section 15. And like all agreements contemplated by section 15, they must be considered individually, on their own merits, based on all the available information and facts of record.

But while all conference ratemaking agreements are required to meet the standards for approval set forth in section 15, as construed in *Investigation of Passenger Travel Agents, supra,* and *F.M.C. v. Svenska Amerika Linien, supra,* the extent of the justification that need be shown for such approval will, of course, vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus, the "legitimate commercial objectives" which the Commission will accept as evidencing the necessity for the restraint will generally be determined by the type and scope of the agreement under consideration. This we made clear in our Adoption of Initial Decision in *Agreement No. 8760–5—Modification of the West Coast United States and Canada/India, Pakistan, Burma, and Ceylon Rate Agreement, supra,* where we explained that, "As indicated in *Svenska,* the scope and depth of proof required from case to case may vary in relation to the degree of invasion of the antitrust laws." Because of the intermodal aspects of Agreement No. 57–96, the Administrative Law Judge would require as justification for its approval only "the most stringent proof of a serious transportation need." We cannot agree.

Agreement No. 57–96 involves after all only an extension of the Conference's existing and approved ratemaking powers. The Conference's basic authority to establish rates and charges port to port, as well as OCP, have obviously already been considered by this Commission or its predecessors and found fully justified and warranted, or else it would not stand approved. So we are concerned here only with conference ratemaking as it applies to intermodal tariffs and traffic. Since the amendment before us represents but an extension of the Conference's established ratemaking authority under its organic agreement and because intermodalism, as it relates to the through movement of cargoes and the

shipper benefits that may be derived therefrom, is generally desirable, we believe that the proof that need be demonstrated to support the approval of Agreement No. 57-96 is considerably less stringent than that the Presiding Officer would require.

Without confusing statistics with the law, as PWC appears to have done here,[14] we would point out that the Commission has in fact to date approved numerous agreements granting conferences intermodal ratemaking authority. While this falls far short of clothing such agreements with a "presumptive validity," it does indicate that the Commission has generally found them to be in the public interest. On the basis of their high rate of approval, we believe that we can properly characterize these types of intermodal agreements as generally acceptable. This is not to say, however, that Agreement No. 57-96 or other like agreements granting conferences intermodal ratemaking authority will be approved summarily merely because similar agreements have been found warranted and approved by the Commission under section 15 in the past. The public interest cannot be served by such tokenism rubber-stamping of submitted agreements and the Commission will not so abdicate its responsibility to assure that "the conduct legalized [by such agreements] does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the regulatory statute." *Isbrandtsen Co. Inc. v. United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954).

Here, applying the standards of section 15 as interpreted in *Svenska*, we find on this record that the approval of Agreement No. 57-96 is "required by a serious transportation need," and will serve "to secure important public benefits." There are some definite legitimate commercial objectives to be derived from the approval of Agreement No. 57-96, one of which is the elimination of the multiplicity of minibridge tariffs which exists under the present system of allowing each PWC member line to file its own individual tariff.

We believe the Administrative Law Judge himself presented the strongest case for the desirability of a single source of tariffs when he stated in his Initial Decision that:

> In regard to the present multiplicity of minibridge tariffs it is true that the rate changes are not always made simultaneously. For example, on June 1, 1972, FEC placed a general rate increase in effect. Despite advance notice of the increase, some minibridge operators did not file a corresponding increase for two to three months. Further, a shipper, in order to be certain of obtaining the lowest rate available, must consult as many as 14 tariffs. Undoubtedly, this is inconvenient and might represent a considerable

[14] Referring to some 24 agreements extending the ratemaking authority of conferences to intermodal traffic without a hearing, PWC argues that this "indicates that the Commission has regarded such agreements as presumptively in the public interest." PWC goes on to suggest that the Commission should consider Agreement No. 57-96 to be likewise "presumptively valid" and approve it in the absence of proof that it is detrimental to the commerce of the United States or contrary to the public interest. Since Seatrain formally protested the Agreement, PWC believes that it had the burden of adducing such proof which Seatrain has allegedly failed to do. For reasons heretofore stated, this argument is wholly without merit. There is no presumption in favor of conference ratemaking agreements. Each must be considered on its own merits and approved in light of the standards of section 15. This the Commission has done with regard to each intermodal agreement which has come before it whether approved with or without hearing and any suggestion to the contrary is wholly unfounded and unsubstantiated.

burden if large numbers of commmodities were being shipped. Moreover, the expense of maintaining 14 tariffs could be substantial. A shipper witness indicated that it would be necessary to employ additional personnel in order to keep the tariffs current, though tariff services are available for that purpose. There are also a number of differences in minibridge tariff rules. For example, the minimum charge per container varies between carriers. Some carriers extend credit to shippers while others do not. The prepayment of freight is required by some and not by others.

In spite of these findings and his added observation that "it would be simpler for shippers to look to a single rather than multiple tariff," the Presiding Officer somehow concluded that the multiplicity of intermodal tariffs did not "demonstrate that important public benefits would result if they were well replaced with a single conference tariff." We believe that the Administrative Law Judge's conclusion flies in the face not only of his own unequivocal findings but his own reasoning as well. The facts and realities of the situation speak for themselves.

Undoubtedly, under the present system, a shipper in order to obtain the lowest rates available and most favorable rules as is his want, must continually consult some 14 separate tariffs. This is clearly time consuming and most inconvenient to the shipper and the burden involved will obviously increase with the number of commodities to be shipped. As a result, it follows that it is difficult for some shippers to obtain the benefits of minibridge and the full advantages of that intermodal service are never realized. Therefore, taking the Presiding Officer's own finding to their logical and obvious conclusion, it is clear that the elimination of a multiple intermodal tariff will confer important public benefits which must be given considerable weight in determining the approvability of Agreement No. 57–96.

In connection with our discussion of the virtues of a single source of intermodal tariffs, we point out at this juncture that probably the single most important public benefit that Agreement No. 57–96 can be expected to provide derives from the advantages that conference authority over intermodal rates will offer. This is a point we have alluded to earlier in this opinion and will discuss more fully here. The intermodal movement of cargoes, allowing as it does for continuous movement under a single bill of lading with less handling, provides an essential transportation service to shippers and consignees. As such, intermodalism as a concept is to be encouraged, fostered and promoted. The conference system, we believe, provides the manner by which the development of intermodalism can be most effectively accomplished in the individual trades. As we stated in *Disposition of Container Marine Lines,* 11 F.M.C. 475, 482 (1969): "The conferences, as the dominant commercial units in this trade, in our opinion, should be at the forefront in stimulating and encouraging improvements in transportation."

Not only can the conferences provide the necessary incentives to the institution and implementation of intermodal services but also they can ensure its healthy development. Uniformity of tariff rules is one of the desirable benefits that can be expected to result from the approval of

Agreement No. 57–96. Clearly, conference authority over intermodal rates and traffic, especially during this period of changing transportation systems and concepts, is an important public benefit that militates in favor of the approval of agreements such as the one under consideration here.

In addition to the clear and present benefits that can be derived from Agreement No. 57–96 by virtue of the elimination of the inconveniences and burden to shippers and consignees which naturally flow from the existence of multiple intermodal tariffs, and conference jurisdiction over intermodal rates generally, the approval of Agreement No. 57–96 is also warranted by transportation circumstances and therefore will serve to fulfill a transportation need. As Hearing Counsel point out, although the Conference has not demonstrated any present rate instability or evidence of malpractice, there is definitely potential for both. In short, the conditions and circumstances which have historically led to instability and resulting malpractices in a trade are present here. There is testimony in this record offered by several witnesses that the trade served by PWC, i.e. the U.S. West Coast/Far East Trade (Westbound), is overtonnaged and it is generally acknowledged that overtonnaging invariably gives rise to rate instability and malpractices as the carriers in the trade compete for the available cargo. And when one considers the number of individual minibridge carriers that are competing for the available cargo, the potential to instability becomes very real indeed.

In view of the foregoing, we find and conclude that the threat to stability posed by the existing conditions in the subject trade, which, we might add, can only be expected to continue, if not further deteriorate, as minibridge grows, coupled with the disadvantages which are inherent in a multi-tariff system fully support PWC's jurisdiction over intermodal tariff and traffic, both interior and minibridge.

Hearing Counsel would deny PWC authority over interior intermodal service[15] on the grounds that present transportation circumstances do not warrant it. Hearing Counsel's position appears to us to be somewhat shortsighted and at odds with their stand on the minibridge aspects of Agreement No. 57–96, unless of course, the Commission is expected to await the actual advent of instability, malpractices and the institution of a hodge-podge of differing interior intermodal tariffs before it can act.

Since as of the time of the close of the record here no PWC carrier had filed an intermodal tariff to the Far East other than minibridge, any grant of interior intermodal authority *must* of necessity rest upon potential rather than actual traffic considerations. In this regard, we find considerable merit in PWC's argument that the identical situation which we found

[15] The Administrative Law Judge defined "interior intermodal" as follows:

If minibridge were extracted from Far East intermodalism via the west coast, the remainder would be what has been referred to in this proceeding as "interior intermodal."

existed with regard to minibridge service can be expected to arise in interior intermodal if it is not placed under conference.

Interior intermodal presents an equal if not greater threat to stability than does minibridge if only because the volume of cargo potentially available in intermodal operations from the industrial heartland of the United States exceeds the volume involved in minibridge. Likewise the multiplicity of tariffs can be expected to present even greater difficulties than did with regards to minibridge because of the number of tariffs involved. Under the circumstances, we see no reason or regulatory purpose to be served by limiting the Conference's intermodal authority to minibridge.[16] Accordingly, the approval granted herein extends to interior intermodal as well.

The Administrative Law Judge faults the Conference for not having taken "even preliminary steps leading to implementation of an interior intermodal tariff under the authority it now seeks." To the extent that we understand this objection we find it to be self-defeating. How could PWC be expected to legally implement authority it did not have but now requests? Indeed, if the Conference had taken the "steps" suggested by the Presiding Officer, it could be held to a violation of section 15 for carrying out an unfiled and unapproved section 15 agreement.

While the Administrative Law Judge himself concedes that the Conference's failure to take the "preliminary steps" referred to above "does not *per se* preclude the Commission from approving such authority," he found that it did:

> . . . raise serious questions as to whether such authority if unexercised will seriously inhibit the growth and development of intermodal transportation—thus frustrating a goal which this Commission encourages.

This statement was based in large measure on the fact that unlike minibridge, Agreement No. 57-96, as submitted, does not permit interim individual tariffs.

We share in the Presiding Officer's concern that failure of PWC to expeditiously publish an interior intermodal tariff could deprive the shipping public of benefits which it might otherwise receive if a member line published an intermodal tariff. Accordingly, and consistent with established Commission policy, we are requiring, as a condition to the approval of Agreement No. 57-96, that it be modified to permit PWC member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the Conference implements the authority granted it by the filing of appropriate tariffs. This requirement should obviate the problem that the Presiding

[16] Nor do we really see any purpose or reason to even distinguish between minibridge and interior intermodal. They are after all both through intermodal services which differ only in terms of distance. As such, we absolutely fail to find any significance to the distinction that Hearing Counsel would draw here.

Officer envisioned should the Conference not implement the requested authority.[17]

PWC has taken the position in this proceeding that if the Commission requires any modification to Agreement No. 57-96, it should be done in a manner that requires no further conference vote on the amendment. The problem arises because the unanimity voting provision in the basic Conference agreement places Seatrain in a position to defeat any modification to Agreement No. 57-96, and if approved conditionally, Agreement No. 57-96 itself.

While PWC's concern is premature we do appreciate the situation in which the Conference finds itself. The fact remains, however, that the Commission cannot itself modify Agreement No. 57-96 without the unanimous approval of the present members of PWC including those members who had no part in the original submission. The Commission simply cannot create or impose an agreement upon parties if no such agreement exists and no cases cited by PWC or arguments advanced by it convince us otherwise. The Commission's standing to amend or modify an agreement under section 15 is always subject to the subsequent acceptance of the amendment or modification by the parties thereto. This is not to state, however, that the Commission is powerless to rectify a situation created when a single conference member line consistently frustrates the wishes of the vast majority by continually casting the one dissenting vote in matters that come before the conference and are presumably in the Conference's interest.[18] There are no facts before us, however, that would in any way indicate that this is the situation here.

Finally, we come to the matter of the duration of the approval granted herein. While Agreement No. 57-96, as submitted, would run indefinitely, Hearing Counsel submit that the Agreement should be limited in duration to a period of 18 months with the understanding that the Conference could seek further approval of the Agreement at the end of the period if it wishes to continue offering intermodal service. Hearing Counsel believe that limiting the approval of the Agreement as suggested by them would "enable the Commission to identify any difficulties which might develop in the implementation of the agreement and reevaluate the need for Conference intermodal authority." PWC advises that it would not object to such a condition.

Hearing Counsel's proposal is consistent with Commission policy to

[17] Of course, we would expect that when and if the Conference adopts intermodal tariffs, it will not do so in a manner which will in any way stifle intermodal shipments. The Conference will not be permitted to do indirectly what it cannot do directly.

[18] The Commission has in the past acted where necessary to remove obstacles which have gone against the wishes of a majority of conference members to take necessary action. *Investigation of Passenger Steamship Conference Regarding Travel Agents*, 10 F.M.C. 27 (1966), *aff'd sub nom. Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), and Docket No. 70-16, *Modification of Article 8, Agreement No. 5850—North Atlantic Westbound Freight Association*, discontinued by the Commission's Order served August 20, 1970. More recently the Commission issued an Order in Docket No. 73-74, *Modification of Article, Agreement No. 3302—The Association of West Coast Steamship Companies* directing the Respondent therein to show cause why its unanimity voting provision, which, in certain instances, may have resulted in frustrating the desires of a strong majority of the members of Respondent Conference, should not be modified.

avoid granting indefinite and unmited approval of requests by conferences for authority in the intermodal field. Moreover, in this particular case, it will, as the Presiding Officer has noted, "enable the Commission to pinpoint any problems which may develop with the implementation of Agreement No. 57–96." Accordingly, and consistent with the above, we are limiting the approval of Agreement No. 57–96 to 18 months, which we view as being sufficient time to carry out the authority accorded, without prejudice to the Conference petitioning the Commission for its extension within the time specified in the Order attached hereto.

Self-Policing and Voting

In addition to the question of the approvability of Agreement No. 57–96 under the provisions of section 15 and the matter of PWC's prescription of more clearly defined standards governing the Conference's right to prohibit its members from establishing their own intermodal tariffs, the Commission specifically set down for determination in this proceeding the following two issues:

> . . . whether any modification of Agreement No. 57–96 is warranted in order . . . to restrict the rights of members to vote on matters related to intermodal traffic and tariffs to only those lines who offer and participate in such services, or in order to prohibit the application of Conference self-policing procedures to independent intermodal tariffs published by any of its member lines.

Addressing himself to these issues, the Administrative Law Judge after some discussion concluded that "no modification of Agreement No. 57–96 is warranted" either to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC or to restrict the rights of members to vote on matters related to intermodal traffic and tariffs.

Since no exception was taken to either of these conclusions and since we find that the Presiding Officer's determinations were proper and well-founded, we are adopting so much of the Initial Decision as deals with the "self-policing" and "voting" issues.[19] Those portions of the Initial Decision are attached hereto as an appendix and are incorporated herein by reference.

Motion to Strike Reply to Exceptions

One final matter remains to be considered in this Report. There is pending before the Commission and outstanding at this time a motion

[19] While Hearing Counsel were in complete agreement with those portions of the Initial Decision dealing with voting and self-policing which we are adopting here, they took issue with the statement made by the Presiding Officer on page 39 of the Initial Decision under the heading "Ultimate Conclusions", to wit, that "The self-policing features of Agreement No. 57 are applicable to independent intermodal tariffs published by any member of PWC." Hearing Counsel explain that in the absence of approval of Agreement No. 57–96, they fail to find any justification in the basic Conference agreement upon which to conclude that the self-policing features of Agreement No. 57 are presently applicable. While suggesting that the challenged "Ultimate Conclusion" relating to self-policing was apparently inadvertently made, Hearing Counsel nevertheless submit that it should be amended to conform to the earlier findings of the Presiding Officer on the matter. Hearing Counsel's point is well taken. The ultimate conclusion to which objection is raised was obviously not intended since it is clearly inconsistent with the discussion and finding which preceded it and should accordingly be disregarded.

filed by Seatrain, in which Hearing Counsel join, requesting us to strike certain portions of PWC's Reply to Exceptions, to wit, pages 10–16, as being new material not actually constituting a "reply" to any matter raised on exception.

PWC in its reply to Seatrain's motion concedes that the matter referred to "does deal with new material" but advises that this "new material" relates entirely to two orders of the Commission which are issued subsequent to the filing of PWC's reply brief. PWC thus explains its action as being merely calling the Commission's attention to its own intervening decisions.[20]

Whatever the reasons for PWC's introduction of the matters complained of, it is clear that they do not respond to any thing raised in the exceptions filed by either FEC or Hearing Counsel but rather merely advance further arguments in support of PWC's own exceptions. As such, the challenged matters constitute new material improperly introduced which must be stricken from this record. Accordingly, we are granting Seatrain's motion.

Ultimate Conclusion

Upon the record herein and for reasons stated above, it is concluded by this Commission that:

1. Agreement No. 57–96, granting the Pacific Westbound Conference authority over intermodal rates, is approved pursuant to section 15 of the Shipping Act, 1916, for a period of 18 months, on the condition that such Agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the Conference implements the authority granted it herein by the filing of appropriate tariffs. If amended as provided herein, Agreement No. 57–96 will not be unjustly discriminatory, or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or be contrary to the public interest, or be in violation of the Shipping Act, 1916.

Approval of Agreement No. 57–96 is further conditioned upon the submission of the Agreement, modified as required herein, within 60 days of the date of the Order attached hereto. The effective date of this approval shall be the date upon which the Commission shall receive such modified Agreement.

2. The self-policing provisions of Agreement No. 57–96 are applicable to independent intermodal tariffs published by any member of PWC and no modification of Agreement No. 57–96 in this regard is warranted.

[20] While the concern which apparently motivated PWC to introduce the particular matters at issue here is understandable, we would point out that the Commission is perfectly well aware of its own orders and decisions and need not have them specifically called to its attention. As precedent, they will be duly considered where relevant and appropriate.

3. No modification of Agrement No. 57–96 is warranted to restrict the rights of the Conference members to vote on matters related to intermodal traffic and tariffs.

4. The motion filed by Seatrain Lines, Inc. requesting the Commission to strike certain portions of PWC's Reply to Exceptions is granted.

An appropriate order conditionally approving Agreement No. 57–96 and otherwise effecting the above will be entered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX

EXCERPTS FROM INITIAL DECISION

SELF-POLICING

The Commission requires a determination, among other things, whether modification of Agreement No. 57–96 is warranted in order to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC.

One of the major purposes of self-policing is to insure that competition between the carriers will be on a service basis rather than price and tariff competition as such. The evidence is that self-policing prevents or at least hinders rebating and, particularly where a trade is overtonnaged, it helps to stabilize the trade. There is a widespread belief that there is a greater tendency to commit a malpractice in any trade where the carriers are not subject to a neutral body, self-policing procedure. Self-policing is so integral a part of a section 15 ageement that the Commission is required by the statute to disapprove any agreement which does not provide for adequate policing of the obligations under the agreement. Thus, anyone who advocates, as does Seatrain, that the self-policing provision of a conference ageement has no applicability to members' activities in intermodal services when that traffic and rates thereunder are not being performed pursuant to any conference tariff has a difficult position to sustain. The essence of such position is the contention that self-policing is limited to those services in which the conference has a tariff interest. That is to say that if the conference has no intermodal authority, or having such authority publishes no intermodal tariff and permits individual tariffs, then the conference is not concerned with price competition as such. Having individual tariffs, the carriers are free to set whatever price level they choose and there is no need to commit malpractice since they can lawfully achieve any desired rate and service level by published tariff.

As in the case of voting practices where the comparison was made to break-bulk carriers voting on container issues being considered by the conference, so in the matter of self-policing applicability to business generated under individual tariffs a reference was made by PWC's witness Purnell of the application of self-policing to open-rated commodities. The open-rated commodity is one in which the conference relinquishes control and the ratemaking authority is left to the individual lines who issue their own individual tariffs on commodities where the tariff filing exemption for bulk without mark or count does not apply. Hence, the situation is the exact equivalent of individual minibridge tariffs in the interim before the

conference publishes its own tariff. Mr. Purnell pointed out that individual tariffs of conference members on open-rated commodities are subject to conference self-policing, stating, "I don't believe that opening a rate gives a carrier license to rebate or to perform any other illegal function that is prohibited in the basic agreement. . . ."

The rationale that self-policing is compartmented and that a conference member is free of its salutary influence in a trade in which the conference members are engaged merely because some aspect of it is not conducted under a conference tariff is erroneous in its underlying concept. Self-policing is a means to an end. The end is that violations of the Act are illegal and should be uncovered. Whether a member carrier is violating the Act in the course of its intermodal activities under an individual tariff or under a conference tariff is irrelevant to the issue of conference responsibility under an approved section 15 agreement. If the conference is to obtain or retain approval, it must exercise that responsibility. Even if the conference were to agree with Seatrain's contention—which it does not—it could not be permitted to abdicate its self-policing responsibilities.

Examination of Agreement No. 57 reveals that the self-policing provision relates to all acts or omissions of the parties which constitute malpractices as define in the agreement and in Schedule A to the agreement. These are not limited to acts or omissions with respect to tariffs published by PWC.

Significantly, Seatrain in its brief ignores any reference to this part of the Commission's order, tacitly conceding that it places no great merit in the proposition that the conference has no self-policing authority with regard to members' minibridge services pursuant to individual tariffs.

Accordingly, no modification of Agreement No. 57–96 is warranted nor could it be permitted in order to prohibit the application of self-policing procedures to independent intermodal tariffs published by any member of PWC.

VOTING

The Commission has required that the proceeding determine whether or not Agreement No. 57–96 should be modified in order to restrict voting on intermodal matters to only those member lines who offer and participate in such services.* To this end evidence was introduced which in large measure established that not all members of a conference provide all of the services offered by the conference; that often members have divergent interests in conference services; that usual conference procedures are to allow all members to vote on all conference matters even though some members may not be participating in the precise service which is the subject matter being voted upon; that despite varying interests or noninterest in specific matters of conference concern the

*The agreement provides that all members vote on all tariff matters and the two-thirds majority requirement under Article 7 applies to intermodal tariffs, local tariffs and overland tariffs.

conference system has not been based on limiting member voting to only those services which the member offers; that matters relating to intermodal traffic and tariffs are not so distinctive from other issues which in the past have been matters of conference concern as to warrant deviating from established conference practice of allowing all conference members to vote on all matters concerning the conference. The outstanding example to which the witnesses referred was the divergent interests between break-bulk carriers and container-oriented carriers where conference rules and regulations concerning containerized cargo were hammered out with the participation of break-bulk members. Conceivably, it might have been to the self-interest of break-bulk carriers to inhibit, hamper or prevent the growth of containerized cargo. This was not in fact what occurred.

PWC's Chairman testified that:

> At the present time all members vote on all rates regardless of whether they engage in the full range of transportation within the jurisdiction of PWC. This is a competitive necessity. All of the rates offered by the Conference are in one way or the other interrelated. Further, member line services are constantly changing. Service not provided by a carrier today may be provided the next day, and vice versa. The expansion of minibridge service is a good example. When Agreement 57-96 was adopted by the Conference and submitted for approval, there were only two or three carriers who had minibridge tariffs on file. At the present time there are at least 14. All members in varying degrees are concerned with every rate the Conference publishes.
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> * * *
>
> with the adoption of Conference intermodal rates, shippers in overland territory will have a choice of shipping pursuant to either the local, the overland, or the intermodal tariff. Since these tariffs are necesarily interrelated, it would be unthinkable for the Conference to have a separate group within the Conference whcih would consider and vote upon the intermodal tariff excluding all others but at the same time having all members consider and vote upon the overland and local tariffs. It is not inconceivable that such a procedure would result in rate warfare within the Conference upsetting the stability—which conferences are designed to bring about.

In *Maritime Fruit Carriers Co., Ltd. and Refrigerated Express Lines (A/Asia) Pty., Ltd.*, Docket No. 71-80, mimeo p. 6, served May 8, 1972, the Commission said:

> Conference voting mechanisms are at best delicate things, presumably arrived at after due deliberation of alternatives. By and large the various procedures, and they cover a wide range, work well when considered in the light of the large number and variety of agreements existing in our foreign commerce. These considerations, when taken with the continuing change in carrier relationships, trade conditions and economic and competitive circumstances, makes us on the one hand cautious in the interference with existing voting procedures absent a showing of need and on the other, makes it extremely difficult to formulate hard and fast rules for the governance of future voting procedures.

The evidence in this proceeding does not suggest that the development of intermodalism will be hampered or otherwise inhibited by the participation of nonintermodal carriers in conference voting on intermodal matters. Accordingly, no modification of Agreement No. 57-96 is

warranted in order to restrict the rights of members to vote on matters related to intermodal traffic and tariffs. However, the record establishes that it is not the intent of the conference to vote upon rates contained in member's individual intermodal tariffs which are otherwise permitted.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–46

AGREEMENT NO. 57–96, PACIFIC WESTBOUND CONFERENCE EXTENSION OF AUTHORITY FOR INTERMODAL SERVICES

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date entered its Report, which Report is hereby referred to and made a part hereof;

IT IS ORDERED, That, pursuant to section 15 of the Shipping Act, 1916, Agreement No. 57–96 among the members of the Pacific Westbound Conference is approved for a period of 18 months on the condition that such Agreement be modified to permit the Conference member lines to individually offer intermodal service as to interior intermodal traffic as well as to minibridge traffic until such time as the Conference implements the authority conditionally granted it herein by the filing of appropriate tariffs.

IT IS FURTHER ORDERED, That the approval of Agreement No. 57–96 is further conditioned upon the submission of the Agreement, modified as required herein, within 60 days of this Order. The effective date of this approval shall be the date upon which the Commission shall receive such modified Agreement.

IT IS FURTHER ORDERED, That the conditional approval granted herein is without prejudice to the filing of an application for its extension. Any application for extension of the period of approval must be filed with the Commission with certificate of service upon all parties to the present proceeding not later than the 60th day prior to expiration of the approval here given.

FURTHER, IT IS ORDERED, That the Motion to Strike Reply to Exceptions filed by Seatrain Lines, Inc. in this proceeding is hereby granted.

FINALLY, IT IS ORDERED, That this proceeding be discontinued.
By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-39

CATERPILLAR OVERSEAS, S. A.

v.

SOUTH AFRICAN MARINE CORPORATION (N.Y.)

NOTICE OF ADOPTION OF INITIAL DECISION

October 27, 1976

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 27, 1976.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-39

CATERPILLAR OVERSEAS, S.A.

v.

SOUTH AFRICAN MARINE CORPORATION (N.Y.)

Adopted October 27, 1976

A common carrier by water is an indispensable party to a complaint proceeding seeking reparation for alleged overcharges. Process served upon a single respondent, alleged in the complaint to be a common carrier by water but, who, in fact, is not, is a nullity. The defect is jurisdictional and may not be remedied. Complaint dismissed.

William Levenstein for complainant.

Seymour Kligler for respondent.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

This is a reparation proceeding in which the complainant, Caterpillar Overseas, S.A., seeks an award of $4,919.53 from the respondent, South African Marine Corporation (N.Y.), for alleged overcharges on nine shipments of engines and parts from New Orleans, Louisiana, to Capetown, South Africa, during the months of June, July and August 1975. The request for relief is predicated upon provisions of United States/South and East Africa Conference Southbound Freight Tariff No. 2, F.M.C. No. 3.

PROCEDURAL BACKGROUND

The complaint was filed pursuant to Rule 11 of the Commission's Rules of Practice and Procedure[2] on July 28, 1976, and was served by the Secretary of the Commission on the following day, July 29, 1976. Respondent's time to answer expired without an answer having been filed. Consequently an Order on Default was entered on August 25, 1976, directing the complainant to file an appropriate motion for default

[1] This decision became the decision of the Commission October 27, 1976.

[2] 46 CFR §§ 502.181 et seq. Rule 11 allows complaint proceedings to be conducted under shortened procedure without oral hearing upon consent of all parties and the approval of the presiding officer.

judgment. Complainant filed a Motion for Default Judgment, but thereafter the respondent moved to vacate the Order on Default.

I granted respondent's motion to vacate the default[3] and directed that respondent's answer to the complaint, which was attached to the motion, be accepted for filing. In view of that action, it was not necessary to rule on the complainant's Motion for Default Judgment. On September 27, 1976, the complainant and respondent filed a Stipulation of Facts and Motion for Authorization to Settle.[4]

FACTS

Paragraph II of the complaint alleged the following:

The *respondent* above named whose address is One Bankers Trust Plaza, New York, New York, *is a common carrier by water* engaged in transportation between New Orleans, Louisiana and Capetown, South Africa, and as such is subject to the provisions of the Shipping Act, 1916, as amended. At the time of the shipments here involved respondent was a member of the United States/South and East Africa Conference and was a party to that Conference's South Bound Freight Tariff No. 2, F.M.C. No. 3. (Emphasis supplied.)

Respondent's answer generally denied the allegations of the complaint, but in response to paragraph II of the complaint, stated:

Admits that its address is at One Bankers Trust Plaza, New York, New York; *that it acts as agent for three common carriers by water* engaged in transportation between New Orleans, Louisiana and Capetown, South Africa, who are subject to the provisions of the Shipping Act, 1916, as amended, who are members of the United States/South and East African Conference, who are parties to that Conference's South Bound Tariff No. 2, F.M.C. No. 3 and, *except as so admitted, deny the allegations of Paragraph II* of the Complaint. (Emphasis supplied.)

The stipulation was signed by counsel for the complainant on September 22, 1976, and by counsel for the respondent on September 23, 1976. Paragraph 2 of the stipulation provides:

The *respondent is the general agent* in the United States *for three common carriers by water* engaged in transportation between New Orleans, Louisiana and Capetown [sic], South Africa, and as such are subject to the provisions of the Shipping Act, 1916, as amended; these common carriers are South African Marine Corp. Ltd., Springbok Lines, Ltd., and Springbok Shipping Company, Ltd. (herein, collectively the "Carriers") and respondent and its undersigned attorneys are authorized to act on their behalf in all matters involved in this proceeding. At the time of the shipments here involved, each of the Carriers was a member of the United States/South and East Africa Conference and each was a party to that conference's South Bound Freight Tariff No. 2, F.M.C. No. 3. (Emphasis supplied.)

An examination of the tariff filed by the United States/South and East Africa Conference, Southbound Freight Tariff No. 2, F.M.C. No. 3[5]

[3] Order on Default Vacated, served September 9, 1976.

[4] The answer stated that the respondent did not agree to shortened procedure. See n. 1. However, by entering into the stipulation subsequently, respondent is deemed to have consented to shortened procedure. See *Consolidated International Corporation v. Concordia Line, Boise Griffin Steamship Company, Inc., as Agents*, 14 SRR 1259, 1260 (1975).

[5] See Original and First Revised Page 1.

confirms that at the times in question, South African Marine Corp., Ltd., Springbok Line Ltd. and Springbok Shipping Co., Ltd., were participating carriers and that South African Marine Corporation (N.Y.) was not a participating carrier in that tariff.

DISCUSSION

On the foregoing facts, the proceeding must be dismissed as a nullity. Section 22 of the Shipping Act, 1916,[6] provides in pertinent part:

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person. . . .

Paragraph IV of the complaint alleges that the complainant "has been subjected to the payment of rates and charges for the transportation which were when exacted and still are in excess of those lawfully applicable in violation of section 18(b)(3) of the Shipping Act, 1916,[7] as amended." As relevant to this proceeding, the operative portion of section 18(b)(3)provides:

No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. (Emphasis supplied).

Thus, the complaint in this proceeding suffers the infirmity of naming, as the sole party respondent, a person who is not a common carrier. Clearly, only the class of persons specified in section 18(b)(3) are amenable to process alleging violations of that section.[8]

The defect is jurisdictional and cannot be remedied in this proceeding. Certainly, the recital in the stipulation that the three common carriers' agent and the agent's attorney "are authorized to act on [the carriers'] behalf in all matters involved in this proceeding" does not make any of those carriers a party. Yet, that status would be indispensable for relief to be afforded under section 22 of the Act. Moreover, under the express provisions of section 22, it is incumbent on the Commission to furnish "a copy of the complaint to such carrier." While it may be the intent of the stipulation to indicate that the agent or its attorney informed the carriers of the complaint, the statute appears to repose exclusive responsibility for the exercise of this function on the Commission, but, even if the stipulation were urging that the function could be performed by another, it does not follow that knowledge of a proceeding commenced against an agent makes the principal a named party to that proceeding.

[6] 46 U.S.C. §§ 817.
[7] 46 U.S.C. §§ 821.
[8] It should be remembered that the complaint alleged that the named respondent was a common carrier. The fact that the respondent is and was not a common carrier did not become settled until the stipulation was filed. Had the complaint identified the respondent singly as an agent, it is unlikely that the Secretary of the Commission would have served process upon the respondent.

CONCLUSION AND ORDER

I find that a common carrier by water is an indispensable party to a complaint proceeding seeking reparation for alleged overcharges. Process served upon a single respondent, alleged in the complaint to be a common carrier by water but, who, in fact, is not, is a nullity. The defect is jurisdictional and may not be remedied. Complaint dismissed.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
September 30, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 476

RIVIANA FOODS
AND/OR HENRY E. SULLIVAN

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

September 22, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on September 22, 1976.

It is Ordered, that applicant is authorized to waive collection of $2,999.72 of the charges due from Riviana Foods and or Henry E. Sullivan.

It is Further Ordered, that applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission on Special Docket No. 476 that effective October 16, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 16, 1975, through November 10, 1975, the rate on 'Olives in Cases or Cartons' is $81.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is Further Ordered, that waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 476

RIVIANA FOODS
AND/OR HENRY E. SULLIVAN

v.

SEA-LAND SERVICE, INC.

Adopted September 22, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on eleven shipments of olives carried by Sea-Land from Cadiz, Spain, to Jacksonville, Florida. The shipments weighed 213,950 kilos and moved under Sea-Land bills of lading dated October 16, 1975.

The rate applicable at the time of the shipments was $94.75 per 1,000 kilos[2] with aggregate freight charges of $20,677.25 (as per revised attachment 6 to the application). Sea-Land seeks to apply a rate of $81.00 per 1,000 kilos[3] with an aggregate freight of $17,330.95.[4] The application seeks to waive the collection of $2,999.72.

Prior to February 17, 1975, Sea-Land's rate on olives from Spanish ports, including Cadiz, to South Atlantic and Gulf ports, including Jacksonville, was $94.75. Effective that date Sea-Land published a reduced rate of $81.00 to meet the competition of Lykes Bros. Steamship Co., Inc. Lykes' rate on olives was $1,450.00 per 20-foot containers which at a loading of 18 tons per container works out to $80.55 per 1,000 kilos.[5] Sea-Land's intention was to maintain the $81.00 rate so long as

[1] This decision became the decision of the Commission September 22, 1976.

[2] Sea-Land Service, Inc. Tariff No. 169-B, FMC-98, Item 6000 13th Revised Page 19. Page 2 of the application inadvertently states the rate as $94.50.

[3] Sea-Land Service, Inc. Tariff No. 169-B, FMC-98, Item 6000, 14th Revised Page. 19.

[4] A Spanish tax of 2 percent was levied on the ocean freight ($346.58) making the total actually collected by Sea-Land $17,677.53.

[5] Lykes Bros. Olive Freight Tariff No. 1, FMC-49, 17th Revised Page 8. On April 19, 1976, 18th Revised Page No. 8 changed the rate to $80.00 per 1,000 kilos. This rate expires May 31, 1976.

Lykes' rate remained unchanged and in fact the $81.00 rate was renewed on 10th thru 13th revised pages 19. However 13th revised page 19 carried an expiration date of October 9, 1975, and Sea-Land's Genoa office with the "pricing responsibilities for Sea-Land's . . . Westbound service from the Mediterranean to U. S. ports" failed " through complete administrative oversight to send timely instructions" to the home office at Edison, N. J. to "extend or make permanent the $81.00 rate." The oversight was discovered sometime shortly before October 22, 1975, during a discussion between the "stateside pricing division and Genoa, on which date Genoa sent a teletype request to reinstate the $81.00 rate without an expiration date. Fourteenth revised Page 19 containing the $81.00 rate became effective on November 10, 1975. Sea-Land states that "neither the notify party nor the principals of the shipper, Riviana Foods . . . knew or had reason to believe" that the $81.00 had been allowed to lapse; and Sea-Land again states that the lapse was due to a "wholly unintentional oversight." In fact when the notify party Henry E. Sullivan paid the freight he automatically reduced the rate to $81.00.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90-298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90-298)[6] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[6] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916; Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

The Senate Report[7] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent failure of Sea-Land to extend the $81.00 rate when it clearly intended to do so presents the kind of situation section 18(b)(3) was intended to remedy and the requested waiver should be granted.

It is therefore found that:

1. There was an inadvertent failure to extend the intended rate beyond its then applicable expiration date;

2. The waiver requested will not result in discrimination among shippers;

3. Prior to requesting permission for the waiver of collection of a portion of the freight charges Sea-Land filed a new tariff setting forth the rate upon which the waiver would be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land will be permitted to waive the collection of $2,999.72 from the notify party, Henry E. Sullivan.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
August 31, 1976.

[7] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 478

KURTIN WOOL STOCK CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 6, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 6, 1976.

It is Ordered, That applicant is authorized to waive collection of $74.67 of the charges due from Kurtin Wool Stock Corporation.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 478 that effective October 21, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 21, 1975 through November 26, 1975 the rate on 'Rags, including waste materials from textile fabrics, (excluding cotton remnants), in compressed bales, in House to House containers, minimum 30,000 lbs. per container' to Bilbao, Spain only is $55.75 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 478

KURTIN WOOL STOCK CORP.

v.

SEA-LAND SERVICE, INC.

Adopted October 6, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land is applying for permission to waive collection of a portion of the freight charges on a shipment by the Kurtin Wool Stock Corporation. The shipment consisted of Rags,[2] and weighed 29,723 lbs. It was carried by Sea-Land from Elizabeth, New Jersey, to Bilbao, Spain, under a Sea-Land bill of lading dated November 1, 1975. The rate applicable at the time of shipment was $55.75 per 2240 lbs., minimum 30,000 lbs. (No Discount) contained in Sea-Land Freight Tariff No. 166 FMC–43, Item 6750, 30th Revised Page 110. This rate resulted in aggregate freight charges of $746.65. The rate sought to be applied is $55.75 per 2240 lbs., minimum 30,000 lbs. less 10% House to House discount. (Sea-Land Freight Tariff No. 166, FMC–43, Item 6750, 32nd Revised Page 110). This rate would have resulted in total freight charges of $671.98. Permission to waive collection of $74.67 is sought.

Prior to October 21, 1975, Sea-Land's rate on "Rags" from North Atlantic ports to Spanish ports was $65.00 per 2240 lbs. minimum 13 tons per container, with a rate of $31.00 applying on weight in excess of 13 tons in the same container, not subject to the House to House discount. There was at this time, however, an American Export Lines rate on "Rags" of $55.75 per 2240 lbs. less 10% discount in House to House containers.

In order to meet the competition to Bilbao, Sea-Land's North Atlantic

[1] This decision became the decision of the Commission October 6, 1976.

[2] The full description was Rags, including waste materials from textile fabrics (excluding cotton remnants), in compressed bales, in House to House containers.

pricing division instructed the tariff publishing officer to publish the same rate and conditions "by proposal dated October 17, 1975, specifying effective date of October 21, 1975." The filing was made by telex with an effective date of October 21, 1975. (See 30th Revised Page 110 of Tariff No. 166, *supra*). Although the publication instruction specifically omitted the reference "(NSD)" so that the rate would be subject to the 10% House to House discount authorized by paragraph 2(a)(1) of item 80 on 15th Revised Page 34 of the tariff, both the telex and the entry on 30th Revised Page 34 of the tariff bore the reference "(NSD)" thus precluding the application of the 10% discount. The error was not discovered until after the shipment here, and one other,[3] had moved.

Kurtin's freight forwarder, Robbins Fleising Forwarding, Inc., having learned of error in the tariff publication, deducted the 10% discount of $74.67 when it paid the freight charges on or about November 20, 1975. In summary Sea-Land says:

> As stated hereinbefore, clerical error by Sea-Land's tariff publishing personel caused the telex filing of October 21 to contain the reference [(NSD)] which made the rate not subject to the discount. The publication instructions clearly intended that the rate be affirmatively subject to the discount so that it would be competitively equal to the rate applicable via other carriers. Respondent does not believe that any discrimination will result from a waiver of collection of the under-payment here involved.[4]

The error was corrected on November 26, 1975, by the filing and publication of 32nd Revised Page 110 which made the rate subject to the 10% House to House discount.

The rate sought to be applied here would appear to cover only shipments of a minimum of 30,000 lbs. The shipment of Kurtin weighed 29,723 pounds. When asked how Kurtin's shipment could qualify for the rate sought, Sea-Land amended its application:

> Tariff No. 166, FMC-43, as shown on 20th Revised Title Page . . . is subject to the regulations contained in Sea-land Tariff No. 171, FMC-49. Item 160 of that tariff, as shown on original page 14 . . . is authority for assessing charges on the minimum per trailer weight of 30,000 lbs. as a maximum on the 29,723 lbs. here involved.[5]

Under Item 160 the rate sought by Sea-Land is applicable.if the application otherwise satisfies the criteria of 18(b)(3).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90-298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a

[3] Sea-Land has filed another Special Docket application to take care of the other shipment. See Special Docket No. 480.

[4] The lack of discrimination is discussed below.

[5] Item 160 of Tariff No. 171, FMC-49 provides:

> The charge for a shipment of lesser weight or measurement quantity shall not exceed the charge for a shipment of a greater weight or measurement quantity of the same commodity.

portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90-298)[6] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[7] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $74.67.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 14, 1976.

[6] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[7] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 480

DOUGLAS MATERIAL COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 6, 1976

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 6, 1976.

It is Ordered, That applicant is authorized to waive collection of $74.67 of the charges due from Douglas Material Company.

It is further Ordered, That applicant shall promptly publish in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 480 that effective October 21, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 21, 1975 through November 26, 1975 the rate on 'Rags, including waste materials from textile fabrics, (excluding cotton remnants), in compressed bales, in House to House containers, minimum 30,000 lbs. per container' to Bilbao, Spain only is $55.75 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 480

DOUGLAS MATERIAL COMPANY

v.

SEA-LAND SERVICE, INC.

Adopted October 6, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land is applying for permission to waive collection of a portion of the freight charges on a shipment by the Douglas Material Company. The shipment consisted of Rags,[2] and weighed 24,642 lbs. It was carried by Sea-Land from Boston, Massachusetts, to Bilbao, Spain, under a Sea-Land bill of lading dated November 17, 1975. The rate applicable at the time of shipment was $55.75 per 2240 lbs., minimum 30,000 lbs. (No Discount) contained in Sea-Land Freight Tariff No. 166 FMC–43, Item 6750, 30th Revised Page 110. This rate resulted in aggregate freight charges of $746.65. The rate sought to be applied is $55.75 per 2240 lbs., minimum 30,000 lbs. less 10% House to House discount. (Sea-Land Freight Tariff No. 166, FMC–43, Item 6750, 32nd Revised Page 110). This rate would have resulted in total freight charges of $671.98. Permission to waive collection of $74.67 is sought.

Prior to October 21, 1975, Sea-Land's rate on "Rags" from North Atlantic ports to Spanish ports was $65.00 per 2240 lbs. minimum 13 tons per container, with a rate of $31.00 applying on weight in excess of 13 tons in the same container, not subject to the House to House discount. There was at this time, however, an American Export Lines rate on "Rags" of $55.75 per 2240 lbs. less 10% discount in House to House containers.

In order to meet the competition to Bilbao, Sea-Land's North Atlantic

[1] This decision became the decision of the Commission October 6, 1976.

[2] The full description was Rags, including waste materials from textile fabrics (excluding cotton remnants), in compressed bales, in House to House containers.

pricing division instructed the tariff publishing officer to publish the same rate and conditions "by proposal dated October 17, 1975, specifying effective date of October 21, 1975." The filing was made by telex with an effective date of October 21, 1975. (See 30th Revised Page 110 of Tariff No. 166, *supra*). Although the publication instruction specifically omitted the reference "(NSD)" so that the rate would be subject to the 10% House to House discount authorized by paragraph 2(a)(1) of item 80 on 15th Revised Page 34 of the tariff, both the telex and the entry on 30th Revised Page 34 of the tariff bore the reference "(NSD)" thus precluding the application of the 10% discount. The error was not discovered until after the shipment here, and one other,[3] had moved. In summary Sea-Land says:

As stated hereinbefore, clerical error by Sea-Land's tariff publishing personnel caused the telex filing of October 21 to contain the reference [(NSD)] which made the rates not subject to the discount. The publication instructions clearly intended that the rate be affirmatively subject to the discount so that it would be competitively equal to the rate applicable via other carriers. Respondent does not believe that any discrimination will result from a waiver of collection of the under-payment here involved.[4]

The error was corrected on November 26, 1975, by the filing and publication of 32nd Revised Page 110 which made the rate subject to the 10% House to House discount.

The rate sought to be applied here would appear to cover only shipments of a minimum of 30,000 lbs. The shipment of Douglas weighed 24,642 pounds. When asked how Douglas' shipment could qualify for the rate sought, Sea-Land amended its application:

Tariff No. 166, FMC-43, as shown on 20th Revised Title Page . . . is subject to the regulations contained in Sea-Land Tariff No. 171, FMC-49. Item 160 of that tariff, as shown on original page 14 . . . is authority for assessing charges on the minimum per trailer weight of 30,000 lbs. as a maximum on the 24,642 lbs. here involved.[5]

Under Item 160 the rate sought by Sea-Land is applicable if the application otherwise satisfies the criteria of 18(b)(3).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90-298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed

[3] Sea-Land has filed another Special Docket application to take care of the other shipment. See Special Docket No. 478.

[4] The lack of discrimination is discussed below.

[5] Item 160 of Tariff No. 171, FMC-49 provides:

The charge for a shipment of lesser weight or measurement quantity shall not exceed the charge for a shipment of a greater weight or measurement quantity of the same commodity.

a new tariff which sets forth the rate on which such refund or waiver would be based. *The application for refund must be filed with the Commission within one hundred and* eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[6] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[7] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver or the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new tariff.
2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.
4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $74.67.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 14, 1976.

[6] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[7] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping AQCT, *&*†: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-31

CSC INTERNATIONAL INCORPORATED

v.

WATERMAN STEAMSHIP CORPORATION

ORDER ON REMAND

October 8, 1976

By complaint filed August 18, 1975, CSC International, Incorporated (CSC) seeks reparation from Waterman Steamship Corporation for an alleged freight overcharge in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), on a shipment described in the bill of lading as Chemicals N.O.S., carried by Respondent from New Orleans, Louisiana to Keeling, Taiwan. The proceeding was conducted under the shortened procedure set forth in Rule 11(a) of the Commission's Rules of Practice and Procedure (Rules) (46 C.F.R. 502.181). Administrative Law Judge Charles E. Morgan (ALJ), issued an Initial Decision dismissing the complaint. The proceeding is before the Commission on exceptions from CSC and Respondent's reply thereto.

The bill of lading covering CSC's cargo is dated August 17, 1973. The complaint asking reparation for the injury caused by the carrier's alleged freight overcharges was received at the Office of the Commission's Secretary on August 18, 1975.

The ALJ, after considering the date of the bill of lading and the date the complaint was received by the Commission, concluded that the complaint was filed one day after the expiration of the two-year limit set out in section 22 of the Act and, on that ground, dismissed the complaint for lack of jurisdiction.

CSC contends that under normal conditions the complaint mailed from New York on August 14, 1975 would have been received by the Commission by August 17, 1975. August 17th, however, fell on a Sunday when the Commission's offices were closed for business. CSC asks that under these circumstances the Commission apply the common law rule for the computation of the two-year period of section 22 of the Act; that it accept the filing of the complaint as timely; vacate the Initial Decision and remand the case to the ALJ for a decision on the merits.

The common-law rule advocated by CSC:

1. excludes the day the cause ot action accrued and includes the last day of the period in the count;[1] and
2. permits filing on the succeeding business day when the last day of the period falls on a Saturday, Sunday or legal holiday.

Respondent in reply, points out that the "common law rule" referred to, and relied upon, by CSC is incorporated in Rule 7(a), which specifically excepts from its coverage complaints filed under Rule 5(c).[2] Respondent therefore contends that under its own rules, the Commission should deny CSC's request, adopt the Initial Decision and dismiss the complaint.

The only reference in the Commission's Rules to the computation of the two-year statutory period is found in Rule 7(a) which by express terms makes this method of computing time inapplicable to filings under Rule 5(c), that is complaints seeking reparation filed under section 22 of the Act. The Commission, however, has reserved in Rule 1(j)[3] the right to waive any of its rules, (except one not relevant here) provided such a waiver:

(1) is not inconsistent with any statute; and

(2) is warranted to prevent manifest injustice, or undue hardship.

Rule 1(b) of the Commission's Rules provides that the Commission offices are open from 8:30 a.m. to 5:00 p.m. Monday through Friday (46 C.F.R. 502.2). Thus, the offices of the Commission were closed not only on Sunday, August 17, 1975, the last day of the two-year limitation period, but also on the preceding Saturday, August 16th.

Under these circumstances dismissal of the complaint for late filing would cause undue hardship. To avoid this result the Commission, in the exercise of its discretion, waives pursuant to Rule 1(j) the exception of Rule 5(c) contained in Rule 7(a), so that by making Rule 7(a) applicable to the computation of the two-year period herein, the filing of the complaint on Monday, August 18, 1975, is considered to be timely.

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[1] Filing, . . . is not complete until the document is delivered and received. *United States v. Lombardo*, 241 U.S. 75, 76 (1916).

The ALJ's conclusion that the complaint was filed one day too late must have been based on such a computation, for by excluding August 17, 1973 (the date of the bill of lading) and starting the count with August 18th, 1973, the last day for filing the complaint within the two-year limit would be August 17, 1975. The complaint, as mentioned, was received by the Commission on Monday, August 18th.

[2] Rule 7(a) reads in relevant part:

In computing any period of time under the rules of this Part, *except section 502.63* (Rule 5(c)), the time begins with the day following the act . . . and includes the last day of the period, unless it is a Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. . . . 46 C.F.R. 502.101. (Emphasis added)

Rule 5(c) provides in part:

Complaints seeking reparation shall be filed within two (2) years after the cause of action accrues (section 22, Shipping Act, 1916). . . . Notification to the Commission that a complaint may or will be filed . . . will not constitute a filing within the two (2) year period. 46 C.F.R. 502.63.

[3] Rule 1(j) states:

Except to the extent that such waiver would be inconsistent with any statute, any of the rules of this part, except § 502.153 (Rule 10(m)) [which refers to appeals from rulings of presiding officers] may be waived by the Commission . . . in order to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. (46 C.F.R. 502.10).

Consequently, the Initial Decision must be vacated and the proceeding remanded to the ALJ for adjudication on the merits.

THEREFORE, IT IS ORDERED, That, the phrase ". . . except § 502.63 (Rule 5(c)) . . ." in Rule 7(a) (46 C.F.R. 502.101) is waived.

IT IS FURTHER ORDERED, That the Initial Decision herein served January 22, 1976, is vacated, and the matter is remanded to the Administrative Law Judge for further proceeding not inconsistent with this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75-31

CSC INTERNATIONAL, INC.

v.

WATERMAN STEAMSHIP CORP.

ORDER ON REMAND; DISSENTING OPINION

October 8, 1976

Attached hereto is the dissenting opinion of Vice Chairman Morse in regard to the Commission's Order on Remand served in this proceeding October 8, 1976.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

Vice Chairman Morse, dissenting. I oppose the action of the majority for two reasons:

1. The Congress directed that claims for reparations be filed "within two years after the cause of action accrued". The Congress did not say "within two years and one day"—it said "within two years". Nor did the Congress grant us express authority to extend the two-year period. I would deny jurisdiction to grant any extension beyond the two years decreed by the Congress, would adopt the reasoning of the Administrative Law Judge, and would apply the literal reading of the statute.

Section 22 of the Shipping Act, 1916, has been in effect sixty years, and it has never before been held that the Section 22 time limitation may be extended by us. Our own rules, Rule 7(a), specifically excepts from its coverage complaints for reparations filed under Rule 5(c)[4]—thereby indicating our predecessor's opinion they had no jurisdiction to extend the two-year period specified in Section 22. This is a time limitation dealing with business and the business community, and while the community may often be inept in protecting its rights nevertheless it is fully aware of its rights. Here there is no social need to allow flexibility as is the case in personal injury, fraud, and other tort situations where the injured person is often unfamiliar with his rights and statute of limitations.

[4] See Footnote[2], supra.

In my opinion, the decision of the majority constitutes but a loose and unnecessary interpretation of a statute which is stated in precise terms.

2. In my opinion, the majority erred in applying Commission Rule 1(j). There is no "hardship" on this record, let alone "undue hardship". Claimant, by the exercise of ordinary business prudence in auditing its freight bills, should have become aware that it had a claim for reparations months before the expiration of the two-year period. That it may have failed to so become aware would be due to sloppy internal auditing practices, which I find it unnecessary to condone. Delays in the mails were not a new and unknown factor in August 1975. Hence, when claimant observed, as it must have done, that the time for filing was about to expire on Sunday, August 17, 1975, ordinary business prudence on the part of claimant and its counsel would have called for hand delivery to the Commission on Thursday, August 14, or Friday, August 15, 1975, instead of posting the complaint from New York on Thursday, August 14, 1975.

Under these circumstances it is a travesty to say that a waiver of our rules was required to prevent "undue hardship" or "manifest injustice" or required in "the expeditious conduct of business".

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(I)

THE FEDERAL MINISTER OF DEFENSE
FEDERAL REPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY AND REPUBLIC VAN AND STORAGE OF LOS ANGELES, INC.

ORDER ON REMAND

October 26, 1976

This proceeding was initiated upon the complaint of the Federal Minister of Defense, Federal Republic of Germany (Complainant) against Republic International Forwarding Company (Republic) and Republic Van and Storage of Los Angeles, Inc. (Van & Storage), alleging freight overcharges in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), on the shipment of an automobile from Arleta, California, to Hamburg, Federal Republic of Germany. The proceeding was conducted under Subpart S—Informal Procedure for the Adjudication of Small Claims, 46 C.F.R. 502.301, *et seq.* The Settlement Officer issued a decision dismissing the complaint. The Commission determined on its own motion to review the decision of the Settlement Officer.

By letter dated November 23, 1973, Mr. Uwe Thele, a member of the Armed Forces of the Federal Republic of Germany, whose overseas assignment had come to an end, received from Respondent an "estimate" of rates for the transportation of household goods and of an automobile, from Arleta, California, to Hamburg, Federal Republic of Germany. The German Military Representative in the United States (Military Representative) approved the shipment and paid the bill.

The "estimate" quoted a rate for household goods of $97.00 CWT for a load of 3,042 pounds and $90.00 for a load of 4,900 pounds. The rate for the automobile was to be $750 in the first instance, and $700.00 when shipped with the heavier load.

The household goods weighing 2,790 pounds were rated at $97.00 per 100 pounds. The bill, including $247.50 for insurance, amounted to $2,953.80. The automobile which weighed 2,950 pounds was rated at

$75.00 per 100 pounds. The bill amounted to $2,212.50 plus $135.00 for insurance. Total freight charges in the amount of $5,301.30 were paid by Complainant.

After payment of the bill, Complainant discovered that, while the household goods had been rated at the the rate agreed to, i.e., $97.00 per 100 pounds, freight charges for the automobile exceeded by $1,462.50 the estimate quoted in Respondent's November 23, 1973, letter.

Complainant's repeated requests for an adjustment of that charge were to no avail. In refusing to honor Complainant's claim, Respondent took the position that the November 23, 1973, offer was valid only for thirty days and that rates were subsequently increased because of the higher cost of fuel and of fluctuations in the money markets. Thereafter, this complaint was filed.

The Settlement Officer dismissed the complaint noting that as a tariff applicable to the shipment could not be located, a determination on whether Van & Storage had collected the proper charges could not be made.

The ruling of the Settlement Officer must be vacated. Dismissal of the complaint under the circumstances presented in the proceeding below would deprive Complainant from obtaining relief, not because it has been established that it is not entitled to reparation, but because of the lack of information needed to decide the claim on its merits. Unanswered, for example, is:

(a) Whether the rates quoted by Republic and the charges collected by Van & Storage were based upon a tariff on file with the Commission?

(b) Who was the underlying ocean carrier and did it have a tariff applicable to this shipment on file?

(c) Who appears as shipper on the ocean bill of lading?

(d) Whether the bill of lading identifies Republic and/or Van & Storage as independent ocean freight forwarders?

These are some of the questions which must be resolved before a determination can be made as to whether Republic and Van & Storage violated the statute and whether Complainant is entitled to the relief requested.

Further, since resolution of these issues may require an evidentiary hearing which is not available under the informal procedure of subpart S of the Rules, the proceeding will be referred to the Office of Administrative Law Judges for adjudication under the formal procedure provided in Subpart T of the Rules (46 C.F.R. 502.311).

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer be, and hereby is, vacated.

IT IS FURTHER ORDERED, That the proceeding be remanded to the Office of Administrative Law Judges for adjudication under Subpart T of

the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.311 *et seq.*

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 350(I)

UNITED DECORATIVE FLOWER CO., INC.

v.

MAERSK LINE

NOTICE OF DETERMINATION NOT TO REVIEW

October 27, 1976

Notice is hereby given that the Commission on October 27, 1976, determined not to review the decision of the Settlement Officer in this proceeding served October 14, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 350(I)

UNITED DECORATIVE FLOWER CO., INC.

v.

MAERSK LINE

October 14, 1976

Reparation Denied.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed April 5, 1976, United Decorative Flower Co., Inc., (complainant) alleges that Maersk Line (carrier) erred in computing the cubic measurement of a shipment of plastic flowers and foliages from Bangkok, Thailand to Baltimore, Maryland, resulting in an overcharge of $210.63. While a violation of Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

In support of its claim, the complainant furnished a copy of the packing list indicating a total measurement of 798 cubic feet;[2] a copy of the carrier's bill of lading indicating a total measurement of 898 cubic feet; and a copy of a letter from the carrier denying the claim on the basis that it did not have an opportunity to remeasure the cargo while it still was in the carrier's possession.

In response to the complaint, the carrier supplied a copy of the Mate's Receipt showing that the involved cartons were measured upon receipt of the cargo at the Bangkok dock prior to shipment.[3] The bill of lading was prepared using the cubic measurement inserted on the Mate's Receipt arrived at through actual measurement of the cargo.

Here we have a situation where the proper measurement of the cargo was in dispute from the date that the cargo was received by the carrier. According to the facts presented, the shipper and/or the consignee had

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] 45 cartons measuring 32½ × 15½ × 28" and 58 cartons measuring 32½ × 15½ × 25½".

[3] 45 cartons measuring 33½ × 16 × 29½" and 58 cartons measuring 33½ × 16 × 27".

ample opportunity to have requested remeasurement by the carrier in accordance with the terms of the carrier's bill of lading which reads in pertinent part:

". . . the Carrier shall be entitled at any time to . . . remeasure . . . any goods, and freight shall be paid on the proper . . . measurement . . . so ascertained. The expenses of and incidental to . . . remeasuring . . . shall be borne by the carrier if . . . Shipper is found to be correct but otherwise such expenses shall be considered as freight and borne and paid by the Shipper, Consignee. . . ."

The responsibilities of the Carrier, insofar as the contents of the bill of lading are concerned, are set forth in section 1303(3) of the Carriage of Goods by Sea Act, 46 USC 1300 *et. seq.* This section requires the carrier to issue, upon demand of the shipper, a bill of lading showing *inter alia* the pertinent information furnished by the shipper in writing as required by sub-paragraph (b). However, sub-paragraph (c) of that section provides that the carrier shall not be bound to show the information supplied by the shipper in the bill of lading in instances where the accuracy of the information is suspect; or in cases where reasonable means of checking such information is unavailable.

It is apparent that not only were the cargo measurement figures supplied by the shipper questionable, but reasonable means of checking such figures were available.

The issue here is whether the cargo should have been rated according to the dimensions set forth on the shipper's packing list or those arrived at through an actual measurement on the docks prior to shipment.

The fact that the cargo was measured on the dock *before* shipment, and the new measurements inserted on the Mate's Receipt were not contested in time for the carrier to verify the correct measurement prior to delivery of the cargo is *prima facie* evidence that packing list measurements were incorrect.

The Commission has held that where the shipment has left the custody of the carrier, and the carrier is thus prevented from verifying the claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim.[4]

The record in this proceeding fails to establish that the claimant has sustained the necessary heavy burden of proof required for the award of reparation in this instance; and, accordingly, the request for reparation is hereby denied.

(S) Waldo R. Putnam,
Settlement Officer.

[4] docket no 283(I) *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 SRR 16 (1972)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 482

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 27, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 27, 1976.

It is hereby ordered that applicant is permitted to waive collection of $200.70 of the charges otherwise due from Raytheon Co., Inc.

It is further ordered, that applicant shall promptly publish the following notice in its appropriate tariff.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 482 that effective July 1, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1975 through January 29, 1976, the rate on 'Missile Systems and Parts, non-hazardous' is $140.00 W/M subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, that waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 482

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted October 27, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed May 28, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of missile systems and parts weighing 14,760 pounds or 6,695 kilograms and measuring 1,773 cubic feet or 50.176 cubic meters shipped December 3, 1975, from Los Angeles to Naples.

Sea-Land offers the following as grounds for granting the application:

(4) In March, 1975 respondent had negotiated with Raytheon a rate of $140.00 per 1000 Kg. or cubic meter, whichever results in greater revenue, on a new commodity classification "Missile Systems and Parts, non-hazardous." Rate was to apply in Sea-Land's rail-water minibridge service from Pacific Coast ports to ports in Continental Europe and the Mediterranean taking Rate Groups 2 and 5 respectively, as provided in its Tariff No. 193, FMC No. 66 and ICC No. 69.

In compliance with its obligation under Section 15 Agreement No. 10052, telegraphic request was made to the Pacific Coast European Conference for approval of its member lines. The conference initially published an all-water contract rate of $144.35 by telegraphic filing effective April 1 and 2 in its Tariff FMC-15, on 6th revised page 154 and 5th revised page 266, respectively (Attachment No. 1). In the reissue of that tariff into FMC-16 effective July 1, 1975 the rate was reduced to the $140.00 sought by Sea-Land, on original pages 163 and 283, respectively (Attachment No. 2). The expiration date of September 30, 1975 attached to the latter publication was subsequently extended and then eliminated. The same rate is still in effect without expiration date.

Sea-Land concurrently published the rate of $140.00 in Item No. 4330 (New) on 7th revised page 156 (Attachment No. 3) of its Tariff No. 193, FMC No. 66 and ICC No. 69, effective May 29, 1975 on statutory notice. However, on 8th revised page 156 (Attachment No. 4), which was issued effective July 1, 1975 along with numerous other pages to incorporate increases into the rates on the tariff pages (Item 4330 was to be

[1] This decision became the decision of the Commission October 27, 1976.

exempted) the rate in Item 4330 were unaccountably dropped from the page by clerical mistake in tariff compilation, instead of simply carrying the rates forward without increase.

The clerical mistake of dropping the rates from Item 4330 was discovered and a publication request dated July 10, 1975 (Attachment No. 5) to restore the rate to Rate Groups 2 and 5 was sent to the tariff publications department. Unfortunately another clerical mistake occurred here when the clerk inserted a rate of $144.00 instead of $140.00 in the Group 5 rate column (see Attachment No. 5) on the proposed manuscript. Consequently, when brought forward on 9th revised page 156 (Attachment No. 6) effective August 28, 1975 the rate of $144.00 became applicable to Group 5 ports, but the previous rate of $140.00 was correctly brought forward to Group 2 ports. An additional clerical error was made when the Group 5 rate was made subject to a minimum quantity of 40 cubic meters per container; this figure was merely the minimum loadibility that could be achieved by the shipper and was not intended to be published as a requirement for application of the rate.

When the erroneous publication of the $144.00 rate to Group 5 was discovered, it was reduced to the correct figure of $140.00 on 11th revised page 156 (Attachment No. 7), issued December 23, 1975 and effective January 29, 1976. Concurrently, on the same page, related rates to Groups 1, 3, 4 and 6 were added to correspond to the rates in Pacific Coast European Conference Tariff FMC–16(See Attachment No. 2). However, in the interim period the shipments that are the subject of this application were made and the rate of $144.00 was charged on them. Knowing that it was a mistake, the shipper's freight forwarder deducted the excess charges amounting to $200.70 when paying the freight bills.

Attachment No. 8 is copy of bill of lading 995–326508 dated December 2, 1975 showing the original billed ocean freight charges of $7,225.34 at the then effective Tariff rate of $144.00 plus surcharge of $244.36 for a total of $7,469.70. In payment a deduction of $200.70 was made from the ocean freight based on the rate of $140.00. It is the open unpaid amount of $200.40, collection of which is here sought to be waived.

On June 18, 1976, Sea-Land filed a Special Docket Application for waiver of collection of freight charges on a similar shipment. See Special Docket No. 483, *Raytheon Co., Inc. v. Sea-Land Service, Inc.*, Initial Decision served September 29, 1976.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The. . .Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper. . .where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping

Act (Public Law 90-298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The clerical error which led to the failure to file the rate is that which is within the contemplation of section 18(b)(3) of the Act. It is therefore found that:

1. There was a tariff filing error due to inadvertence;
2. The granting of the requested waiver will not result in discrimination among shippers;
3. Prior to applying for permission to waive the collection of a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and
4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is granted to waive the collection of $200.70 from Raytheon Company, Inc.

An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 29, 1976.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 483

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

October 27, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on October 27, 1976.

It is hereby ordered that applicant is permitted to waive collection of $387.71 of the charges otherwise due from Raytheon Co., Inc.

It is further ordered, that applicant shall promptly publish the following notice in its appropriate tariff.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 483 that effective July 1, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1975 through January 29, 1976, the rate on 'Missile Systems and Parts, non-hazardous' is $140.00 W/M subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, that waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 483

RAYTHEON CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted October 27, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed June 16, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on two shipments of missile systems and parts weighing in aggregate 19,960 pounds or 9,054 kilograms and measuring in aggregate 3,425 cubic feet or 96.928 cubic meters shipped January 6 and 16, 1976, from Los Angeles to Naples.

Sea-Land offers the following as grounds for granting the application:

(4) In March, 1975 respondent had negotiated with Raytheon a rate of $140.00 per 1000 Kg. or cubic meter, whichever results in greater revenue, on a new commodity classification "Missile Systems and Parts, non-hazardous." Rate was to apply in Sea-Land's rail-water minibridge service from Pacific Coast ports to ports in Continental Europe and the Mediterranean taking Rate Groups 2 and 5 respectively, as provided in its Tariff No. 193, FMC No. 66 and ICC No. 69.

In compliance with its obligation under Section 15 Agreement No. 10052, telegraphic request was made to the Pacific Coast European Conference for approval of its member lines. The conference initially published an all-water contract rate of $144.35 by telegraphic filing effective April 1 and 2 in its Tariff FMC-15, on 6th revised page 154 and 5th revised page 266, respectively (Attachment No. 1). In the reissue of that tariff into FMC-16 effective July 1, 1975 the rate was reduced to the $140.00 sought by Sea-Land, on original pages 163 and 283, respectively (Attachment No. 2). The expiration date of September 30, 1975 attached to the latter publication was subsequently extended and then eliminated. The same rate is still in effect without expiration date.

Sea-Land concurrently published the rate of $140.00 in Item No. 4330 (New) on 7th revised page 156 (Attachment No. 3) of its Tariff No. 193, FMC No. 66 and ICC No. 69, effective May 29, 1975 on statutory notice. However, on 8th revised page 156 (Attachment No. 4), which was issued effective July 1, 1975 along with numerous other

[1] This decision became the decision of the Commission October 27, 1976.

pages to incorporate increases into the rates on the tariff pages (Item 4330 was to be exempted) *the rate in Item 4330 were unaccountably dropped from the page by clerical* mistake in tariff compilation, instead of simply carrying the rates forward without increase.

The clerical mistake of dropping the rates from Item 4330 was discovered and a publication request dated July 10, 1975 (Attachment No. 5) to restore the rate to Rate Groups 2 and 5 was sent to the tariff publications department. Unfortunately another clerical mistake occurred here when the clerk inserted a rate of $144.00 instead of $140.00 in the Group 5 rate column (see Attachment No. 5) on the proposed manuscript. Consequently, when brought forward on 9th revised page 156 (Attachment No. 6) effective August 28, 1975 the rate of $144.00 became applicable to Group 5 ports, but the previous rate of $140.00 was correctly brought forward to Group 2 ports. An additional clerical error was made when the Group 5 rate was made subject to a minimum quantity of 40 cubic meters per container; this figure was merely the minimum loadability that could be achieved by the shipper and was not intended to be published as a requirement for application of the rate.

When the erroneous publication of the $144.00 rate to Group 5 was discovered, it was reduced to the correct figure of $140.00 on 11th revised page 156 (Attachment No. . 7), issued December 23, 1975 and effective January 29, 1976. Concurrently, on the same page, related rates to Groups 1, 3, 4 and 6 were added to correspond to the rates in Pacific Coast European Conference Tariff FMC–16 (See Attachment No. 2). However, in the interim period the shipments that are the subject of this application were made and the rate of $144.00 was charged on them. Knowing that it was a mistake, the shipper's freight forwarder deducted the excess charges amounting to $200.70 on Shipment No. 1 and $187.01 on Shipment No. 2, a total of $387.71, when paying the freight bills.

Attachment No. 8 hereto (two pages) consists of one copy of each bill of lading/freight bill. Page 1 is No. 995–329837. Shipment No. 1, showing sailing date of January 6, 1976 (actual sailing date was January 8, 1976); page 2 is No. 995–330878, Shipment No. 2, showing sailing date of January 16, 1976 (actual sailing date was January 21, 1976.) Each shows charges as originally calculated and billed at the then effective Tariff rate of $144.00 plus surcharges of $244.36 and $227.68 respectively. Underpayments of $200.70 and $187.01, total $387.71, were made on Shipment Nos. 1 and 2, respectively, in the payment of freight charges, representing the difference between the rate of $144.00 published in the tariff and the rate of $140.00 that should have been published. It is the open unpaid amount of $387.71 for which permission to waive collection is sought.

See Special Docket Application 482, *Raytheon Co., Inc. v. Sea-Land Service, Inc.*, for another shipment involving this rate situation.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The. . .Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper. . .where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as

may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90-298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The clerical error which led to the failure to file the rate is that which is within the contemplation of section 18(b)(3) of the Act. It is therefore found that:

1. There was a tariff filing error due to inadvertence;
2. The granting of the requested waiver will not result in discrimination among shippers;
3. Prior to applying for permission to waive the collection of a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and
4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is granted to waive the collection of $387.71 from Raytheon Company, Inc.

An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
September 29, 1976.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–30

AGREEMENTS NOS. 9718–3 AND 9731–5

The evidence of record is not sufficient to support a finding that Respondents, in 1974, had a monopoly of the trade between Japan and the Pacific Coast to of the United States.

The conduct of Respondents pursuant to their agreements numbered 9718 and 9731 has not been shown to be unjustly discriminatory or unfair as between carriers.

While anticompetitive, Agreement Nos. 9718 and 9731 have, through 1974, tended to ameliorate the overtonnaged condition of the transpacific trades, and have contributed towards keeping a high number of common carriers in those trades. Those results are beneficial to the public, and are sufficient to outweigh the anticompetitive effects of Agreement Nos. 9718 and 9731, demonstrated on this record, so as to justify the continuation of Agreement Nos. 9718 and 9731 through August 22, 1977.

The evidence of record does not support a finding that Respondents have unfairly deprived employment to the members of the Marine Cooks and Stewards Union.

T. S. L. Perlman and *William H. Fort* for Marine Cooks and Stewards Union, Petitioner.

Charles F. Warren, George A. Quadrino, and *John E. Ormond, Jr.* for Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., Showa Shipping Co., Ltd., and Yamashita-Shinnihon Steamship Co., Ltd., Respondents.

John Robert Ewers, Paul J. Kaller, and *Bert I. Weinstein* for the Bureau of Hearing Counsel.

REPORT

November 1, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This is an investigation, commenced by Commission order of August 18, 1975, upon petition of the Marine Cooks and Stewards Union. Respondents, six common carriers in the foreign commerce of the United States, plying the trades between Japan and the Pacific Coast of the United States, are: Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Ltd., Showa Shipping

Co., Ltd., and Yamashita-Shinnihon Steamship Co., Ltd. The Bureau of Hearing Counsel is party to the proceeding by Commission rule.

The subjects of the investigation are the third and fifth amendments, respectively, to Agreement Nos. 9718 and 9731, whereby those two agreements would continue in force and effect through August 22, 1977. Japan Line, Ltd., Kawasaki Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., and Yamashita-Shinnihon Steamship Co., pursuant to Agreement No. 9718, cooperate among themselves so as to provide a coordinated fully containerized steamship service between ports in Japan and ports in California. Similarly, Nippon Yusen Kaisha and Showa Shipping Co., Ltd., pursuant to Agreement No. 9731, cooperate between themselves to provide a coordinated fully containerized steamship service between ports in Japan and ports in California.

The Marine Cooks and Stewards Union is the exclusive collective bargaining representative of those members of the stewards department employed by American Mail Line, American President Line, Matson Navigation Co., Pacific Far East Line, and States Steamship Co. In seeking this investigation, Petitioner alleged that Agreement Nos. 9718 and 9731 were unjustly discriminatory or unfair as between carriers, were detrimental to the commerce of the United States, and were contrary to the public interest, in that the implementation of the agreements deprived carriers flying the flag of the United States of cargo, resulting in a diminution of jobs for the members of the union.

Pursuant to the Commission's Order of Investigation and Hearing, this matter was assigned to an Administrative Law Judge for public hearing, which was conducted, and presided over by Administrative Law Judge Marshall. Prior to the issuance of an Initial Decision, Administrative Law Judge Marshall became unavailable to the Commission, and this proceeding was reassigned to Administrative Law Judge Kline, who issued an Initial Decision on June 21, 1976. Thereafter, Petitioner, Respondents, and Hearing Counsel, excepted to that Initial Decision, and submitted the matter to the Commission. Because of the expedition desired in this proceeding, oral argument before the Commission was not granted.

The ultimate decision for the Commission in this proceeding is whether Agreement Nos. 9718-3 and 9731-5 should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916. Both of those agreements will be approved.

Before discussing the merits of the approval or disapproval of those agreements, the Commission will dispose of an ancillary motion filed by Petitioner.

Petitioner has moved the Commission to consolidate this proceeding with Docket No. 76-14, *Agreement No. 10116-1—Extension of Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington.* Petitioner argues that the subject matters of the two docketed proceedings are closely related in law and fact, and that the consolidation of those proceedings

will facilitate the Commission's decision in both proceedings. Respondents have replied in opposition to that motion, as has Hearing Counsel. Respondents argue that Petitioner has waited too long to ask for consolidation of the two proceedings, and that the issues of law and fact are not closely related.

Petitioner, in that motion, has also asked for oral argument in this proceeding whether or not the two proceedings are consolidated, but only if a grant of oral argument would not delay the Commission's decision in this proceeding beyond November 1, 1976. Respondents oppose that request also. The grant of oral argument in this proceeding would delay decision beyond November 1, 1976. Consequently, oral argument is not granted.

The decision on whether or not to consolidate two proceedings pending before this Commission is a matter committed to the discretion of the Commission. In Docket No. 76-14 Petitioner and Respondents have filed affidavits and memoranda, and Hearing Counsel have filed a memorandum.

If the Commission were to consolidate Docket Nos. 75-30 and 76-14, at this late date, the Commission would wish to hear oral argument from the parties regarding the applicability of the evidence adduced in each proceeding. Time does not permit the Commission to hear that argument before November 1, 1976, the date upon which both Petitioner and Respondents request that the Commission decide Docket No. 75-30. Consequently, the Commission will not consolidate Docket Nos. 75-30 and 76-14.

The merits of the approval or disapproval of Agreement Nos. 9718-3 and 9731-5 will now be discussed.

Petitioner has excepted to the ultimate decision of Administrative Law Judge Kline that the agreements be approved at all. It is the position of Petitioner that the agreements should be disapproved. Respondents have excepted to the limitation on the number of vessels operated pursuant to Agreement No. 9718 imposed by Administrative Law Judge Kline as a condition of approval of the agreements. It is the position of Respondents that the agreements should be approved as submitted. Hearing Counsel's position is that of Respondents.

Administrative Law Judge Kline ultimately found that Respondents had a monopoly by means of the agreements in question, that the implementation of those agreements by Respondents resulted in unfair competition with adverse consequences to certain U.S. flag carriers, and that the agreements secured important public benefits. Administrative Law Judge Kline ultimately concluded that the agreements, unless modified so as to reduce the number of vessels operated pursuant to Agreement No. 9718 from eight to six, were unjustly discriminatory or unfair as between carriers, detrimental to the commerce of the United States, and contrary to the public interest.

In making those findings and conclusions the Presiding Officer erred.

The Initial Decision is reversed, and this Report is entered in lieu of that decision.

Of some importance to the disposition of this case is Petitioner's exception to the rulings by Administrative Law Judge Marshall prohibiting Petitioner from discovering evidence directly bearing upon Respondents' intention to monopolize.

On September 2, 1975, Petitioner served upon Respondents written interrogatories and a notice of examination upon oral deposition. The interrogatories and notice were directed to each Respondent. The notice of deposition provided for the examination of the six officers of Respondents who signed Agreement Nos. 9718 and 9731 at the inception of those agreements. The deposition was to include matters pertaining to the making, amending, modifying, administering, implementing, and carrying out of those two agreements and other agreements. The written interrogatories, and the motion for production of documents, requested Respondents to identify, describe and provide all communications, written or oral, made by Respondents, or by anybody on Respondents' behalf, to governmental officials or agencies of the United States or Japan, with respect to the agreements; and, similarly, communications to Respondents from such officials.

Respondents objected to the oral depositions, and so much of the written interrogatories and motion for production of documents as inquired into communications prior to the request for approval of the amendments under consideration in this proceeding. On September 17 and 18, 1975, Administrative Law Judge Marshall ruled that:

> The requested information, which concerns respondents' *communications* with the U.S. and Japanese governments regarding the approval of or operation under Agreements 9718 and 9731, will be furnished as allegedly bearing on the impact of the agreements on American-flag shipping in the trade between California, Hawaii, Alaska and Japan.
>
> (Rulings on Interrogatories)

In similar manner, Administrative Law Judge Marshall required Respondents to produce documents which were communications, as aforesaid. However, on September 15, 1975, Administrative Law Judge Marshall ruled that Petitioner would not be permitted to take the depositions of Respondents' chief executive officers because:

> Their testimony as to the purposes of respondents in making these agreements and their intentions and objectives in carrying them out would appear irrelevant as the really meaningful evidence should concern the actual results. Since these agreements have been in operation for more than seven years, intentions and objectives are of little interest when compared to established facts. The remaining matter, concerning the relationship of other agreements in the U.S./Japan trade, does not appear to be within the scope of the issues.
>
> (Rulings on Depositions)

In the view of Administrative Law Judge Marshall, because of the distance which the deponents would have to travel, the taking of the depositions would constitute an undue annoyance and inconvenience.

Thereafter, on October 8, 1975, Petitioner filed a second motion to compel Respondents to produce documents constituting communications among Respondents concerning the agreements under investigation. Before Administrative Law Judge Marshall ruled upon that motion, the Commission modified its Order of Investigation, and informed the Administrative Law Judge that he had too narrowly interpreted the Commission's Order of Investigation. On October 30, 1975, Administrative Law Judge Marshall announced that he was withholding ruling on Petitioner's Motion to Compel Production of Documents; and provided that Petitioner could include discovery requests remaining unsatisfied in its discovery requests to be filed by November 3, 1975.

On that latter date Petitioner served Respondents with written interrogatories, substantially the same as Petitioner's first interrogatories, except that in November Petitioner only requested communications made by Respondents regarding Agreement Nos. 9835 and 10116 (the Pacific Northwest space charter and the revenue pool among Respondents in the transpacific trades, respectively), and communications made to Respondents regarding all of the agreements. Petitioner requested copies of any documents evidencing such communications. Petitioner excluded from its request any documents theretofore provided to Petitioner. Petitioner did not again seek to take the deposition of Respondents' chief executive officers.

Respondents now argue that Administrative Law Judge Marshall was correct in his ruling. However, an intention to monopolize is an element of a violation of section 2 of the Sherman Act, 15 U.S.C. 2. Inquiry of those persons responsible for the negotiation of and the policy determinations made in the implementation of Agreement Nos. 9718 and 9731 would be relevant to the subject matter of this proceeding. Further, in such delicate matters as an intention to monopolize, written interrogatories are not an adequate method of discovering evidence. Therefore, Administrative Law Judge Marshall erred by refusing to permit the deposition by oral examination of Respondents' chief executive officers.

Respondents alternatively argue that Petitioner abandoned this discovery effort. Of the several arguments regarding abandonment advanced by Respondents only the last is persuasive. In that argument, Respondents assert that Petitioner evidenced its abandonment of this discovery request by:

> 5. Failure to subpoena at the hearing either respondents' officials or other employees or representatives. (Respondents' Reply to Exceptions, p. 43)

46 C.F.R. 502.136 provides for the issuance of subpoenas for the attendance of witnesses located in a foreign country. That rule directs that all requests for the issuance of such subpoenas shall be directed to the Commission. Petitioner did not request the Commission to issue a subpoena for the attendance of Respondents' chief executive officers at the hearing. Had it done so, Petitioner would have been able to avoid

Administrative Law Judge Marshall's restrictive interpretation of the Commission's Order of Investigation. Failure to exhaust that remedy evidences that Petitioner abandoned its attempt to interrogate those chief executive officers. Therefore, this exception is denied.

Petitioner has also excepted to rulings by Administrative Law Judge Marshall wherein he prohibited Petitioner from discovering evidence regarding the service offered by Respondents in the Japan-Atlantic Coast of the United States trades, pursuant to Agreement No. 9975 (an agreement similar to those at issue here); and the ruling by Administrative Law Judge Marshall wherein he prohibited Petitioner from adducing evidence at the hearing regarding that service. In view of the disposition made of this case regarding the question of monopoly, as is hereinafter more fully explained, and assuming Administrative Law Judge Marshall was in error in prohibiting that discovery, and in refusing to receive evidence regarding the Japan-Atlantic Coast of United States service, that error is harmless. Even if Petitioner had been permitted to adduce evidence showing the nature of and extent of Respondents' service between Japan and the Atlantic Coast of the United States, that evidence would not be a substitute for the lack of proof of the totality of the trade in the Pacific. Therefore, this exception is denied.

During the entire period covered by this investigation there has existed in the transpacific trades several agreements among carriers serving those trades whereby those carriers fix the rates at which cargo will be carried. Two of those agreements include the Japan-U.S. Pacific Coast trades. They are the Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) and the Pacific Westbound Conference (PWC). The former covers the trade from Japan and Korea to Alaska, Hawaii, and the Pacific coast of the U.S. and Canada. The latter covers the trade from the Pacific coast of the U.S. and Canada to Japan, Korea, Taiwan, Hong Kong, Philippines, Viet Nam, Cambodia, Laos, and Thailand.

Each Respondent is and has been a member of both conferences. In addition to Respondents, there were 12 to 15 other members of the TPFCJ/K, and 8 to 13 other members of the PWC during the period under investigation.

Administrative Law Judge Kline found that Respondents, taken as a group, have a monopoly of the Japan to California and the Japan to the United States Pacific Coast conference trades. In order to find that Respondents have a monopoly it is necessary first to define the relevant market in which the monopoly is said to exist. Although the Presiding Officer did not define the relevant market specifically, it appears that he found that market to be the inbound conference trades from Japan to California, and from Japan to the United States Pacific Coast. That definition is not correct.

In order to determine the relevant market it is necessary to consider the services affected and the geographic areas involved. In determining those services it is necessary to identify market alternatives that buyers

may reasonably use for their purposes, a concept of functional interchangeability. *United States v. E. I. DuPont de Nemours and Co.*, 351 U.S. 377, 394, 399 (1956). The concept of substitutes applied to the instant case, compels a conclusion that the relevant market is greater than the inbound conference trades.

The ports of Los Angeles, Long Beach, Oakland, Portland, and Seattle are gateways for shippers and consignees located in areas well beyond the states in which those ports are located. A large quantity of cargo could move alternatively through any of those ports. For that reason the relevant market cannot be geographically less than the U.S. Pacific Coast.

Respondents are liner operators. In addition to the liner operators which are members of the Trans-Pacific Freight Conference of Japan/Korea and/or the Pacific Westbound Conference, at least ten other steamship companies provide liner services between Japan and the U.S. Pacific Coast. Those nonconference liner operators provide an alternative which shippers and consignees may also use for their purposes. In order to determine the share which Respondents have of the relevant market it is necessary to consider the carryings of all liner operators in that market, both conference and nonconference. The Presiding Officer erred, therefore, when he found that Respondents have a monopoly of the inbound *conference* trades because he incorrectly defined those trades as the relevant market.

The record is insufficient to support a finding that Respondents have a monopoly of the relevant market, because it is not possible, on this record, to determine the share which Respondents have of any market greater than the inbound conference trades. Nonconference operators in the Japan-U.S. Pacific Coast trades include Far Eastern Shipping Co., Maersk Lines, Orient Overseas Line, Orient Overseas Container Line, Oyama, Cutlass, Retla, Seaway Express, Scindia Steam Navigation Co., and Shipping Corporation of India.

This record does not contain probative reliable evidence of the volume of cargo carried by those nonconference steamship companies. Exhibit 23, pages 20-23, purport to show the liner service in the Japan-California trades for the calendar years 1971 through 1974, inbound and outbound. The statistics on that Exhibit are given in long tons, whereas the cargo carryings of Respondents are given in revenue tons. There is no means provided to convert those long tons into revenue tons. The data contained on those pages are not consistent with other information in the record, and those differences are not explained. The data purports to be derived from statistics of the Maritime Administration of the Department of Commerce. There is substantial doubt that liner service on those pages of Exhibit 23 is the same service as the liner service understood by the Commission.

Of similar unreliability is Exhibit 23, page 24, which purports to be the revenue tons carried by each member line of the Pacific Westbound Conference in the "California/Japan-Korea trade". The data contained on

that page are not consistent with the cargo statistics provided by individual lines, such as American President Line, Pacific Far East Line, United States Lines, and Sea-Land Service, Inc., and there is testimony in the record to the effect that the data on that table include bulk carryings and tramp carryings at rates other than those set by the Pacific Westbound Conference. Those inconsistencies indicate that that document is not a reliable indicator of the quantities of cargo carried in the Japan-California trade by members of the Pacific Westbound Conference.

Further, what purports to be the cargo statistics of the Trans-Pacific Freight Conference of Japan/Korea for the years 1972 through 1974, found at Exhibit 23, pages 5–7 and 19, do not separately identify cargo originating in Korea, as compared to Japan, or separately identify cargo destined to Canada, Alaska, and Hawaii, as compared to California and the Pacific Northwest.

The deficiencies in evidence indicated above often result when, as here, an exhibit, such as Exhibit 23, consisting of 67 pages of tables, is offered and admitted in evidence without a witness to explain the source of the data contained in the exhibit, how those data were presented in the exhibit, and the differences between the data contained in the exhibit and data contained in other exhibits.

In any event, on this record, Petitioner has failed to prove that Respondents have a monopoly.

The Presiding Officer also found that the decision in 1972 by Respondents to double the fleet of ships operating under Agreement Nos. 9718 and 9731, coupled with the provision by Respondents of twice weekly service between Japan and California and the practice by Respondents of multiple solicitation of cargo (each member soliciting for a single vessel on each sailing), has resulted in ". . . unfair and destructive competition among conference carriers, especially American carriers except Sea-Land." (I.D., p. 42)

About 1966 Matson Navigation Company approached Nippon Yusen Kaisha with a proposal that those two carriers share a container terminal in Japan. NYK approached the Ministry of Transport of the Government of Japan in order to determine if was permissible for NYK to enter into such an agreement with Matson Navigation Company. That inquiry gave rise to a general inquiry into the containerization of the Japan-U.S. Pacific Coast trade. The whole matter was referred by the Ministry to the Shipping and Shipbuilding Rationalization Council, an advisory group to the Ministry of Transport. Thereafter, that council recommended that the trades be containerized, and that Respondents develop a method to do so efficiently. Thereupon, Respondents conferred among themselves, and devised the agreements which came to be known as Agreement Nos. 9718 and 9731. Those agreements were approved by the Ministry of Transport in 1967.

Upon that approval, the Development Bank of Japan loaned to Respondents sufficient monies to permit the building of the fully contain-

erized vessels to be used in the Japan-U.S. Pacific trades. The Development Bank of Japan is an instrumentality of the Government of Japan, and provided subsidy to the Japanese flag shipping companies in the nature of construction loans at a rate of interest below the rates commercially available. The percentage of the cost of any particular vessel which the Bank would loan was directly related to the desirability of the construction of that vessel in the view of the Government of Japan. In the case of the vessels employed by Respondents in the Japan-U.S. Pacific Coast trade, the percentage was quite high. For example, the Bank loaned 80 percent of the cost of construction of the *Hakusan Maru,* employed pursuant to Agreement No. 9731.

Upon receipt of the loans Respondents negotiated with shipbuilding companies for the construction of the containerships. Respondents let contracts for the construction of the vessels one to one and one half years before the vessels were delivered to Respondents. At the inception of these two agreements, it was determined that Japan Line, Kawasaki Kisen Kaisha, Mitsui O.S.K. Line, and Yamashita-Shinnihon Steamship Company would operate four vessels pursuant to Agreement No. 9718, and that Nippon Yusen Kaisha and Showa Shipping Company would operate two vessels pursuant to Agreement No. 9731. Those six vessels were delivered to Respondents and placed in service in the Japan-California trades in the period August through November 1968.

In 1968 an arrangement similar to Agreement Nos. 9718 and 9731 was devised for the Japan-Pacific Northwest trades. It is Agreement No. 9835. At its inception it was decided that the six Respondents would operate three vessels in the Japan-Pacific Northwest trades.

As of 1974 Respondents had 18 containerships in the Japan-U.S. Pacific Coast trades. Those vessels were put in service over several years. Sometime before March of 1970, Respondents agreed to build three more containerships to be used in the Japan-California trades. Sometime before April of 1971 Respondents agreed to build three additional vessels to be used in the Japan-California trades and three additional vessels to be used in the Japan-Pacific Northwest trades. Those vessels were placed in service in the Japan-California trades as follows: to be employed pursuant to Agreement No. 9718, one vessel in November 1971, one vessel in February 1972, one vessel in May 1973, and one vessel in June 1973; to be operated pursuant to Agreement No. 9731, one vessel in April 1972, and one vessel in June 1973. The vessels operated pursuant to Agreement No. 9835 in the Japan-Pacific Northwest trades were placed in service as follows: one vessel in May 1970, one vessel in September 1970, one in December 1971 (which was removed in February 1972 and not replaced until August of 1973), and one each in April, May, and October 1974.

The consortium of four Respondents, operating pursuant to Agreement No. 9718, provides twice weekly service between Japan and California. The consortium of two Respondents, operating pursuant to Agreement No. 9731, provides weekly service between Japan and California. The

consortium of all six Respondents, operating pursuant to Agreement No. 9835, provides weekly service between Japan and the Pacific Northwest Coast of the United States. Those service levels were as of the date of hearing in January 1976.

In 1969 the utilization of Respondents' vessels, in the inbound trade, employed pursuant to Agreement No. 9718, ranged from a low of 68 percent for the *Kashu Maru* to a high of 87 percent for the *Japan Ace*, with an average of 76.5 percent. Similarly, the vessels operated pursuant to Agreement No. 9731 were utilized in 1969 in the inbound Japan-California trade to the extent of 77.6 percent of their capacity. In 1970 the level of utilization for the 9718 group inbound averaged 83 percent, and the utilization for the 9731 group inbound averaged 82 percent. In 1971 the utilization inbound averaged 95.3 percent for the 9718 group, and averaged 93.3 percent for the 9731 group. In all instances, the utilization westbound was less than the utilization eastbound. In the years 1972 through 1974 the utilization of the vessels employed by Respondents in the Japan-California trades declined. In that latter period, as in the former, the utilization was better eastbound than westbound.

As Respondents constructed and added new fully containerized vessels to the Japan-U.S. Pacific Coast trades, they gradually eliminated the older vessels previously employed by Respondents in the liner service between Japan and the U.S. Pacific Coast. During that period, the percentage of all cargo moving on conference vessels which moved in containers increased from 25.6 percent in 1968 to 94.6 percent in 1974.

Pursuant to all three agreements, Nos. 9718, 9731, and 9835, Respondents charter from each other blocks of space on all the vessels employed pursuant to these agreements, which, as of the end of 1974, were eight vessels pursuant to Agreement No. 9718, four vessels pursuant to Agreement No. 9731, and six vessels pursuant to Agreement No. 9835. Consequently, each Respondent may advertise sailings at a frequency greater than that actually performed by the vessel owned by that Respondent. For example, when the *Japan Ace*, owned by Japan Line, calls at Oakland, California, not only does Japan Line advertise the sailing of that vessel under its flag, but Kawasaki Kisen Kaisha, Mitsui O.S.K. Lines, and Yamashita-Shinnihon Steamship Company also advertise the sailing of that vessel under their respective banners, each of those three Respondents having chartered one fourth of the *Japan Ace*. Similar arrangements are followed for each of the other vessels operated pursuant to Agreement Nos. 9718, 9731, and 9835. Consequently, four of Respondents solicit cargo for each sailing of each vessel operated pursuant to Agreement No. 9718, two Respondents solicit cargo for each sailing of each vessel operated pursuant to Agreement No. 9731, and all six Respondents solicit cargo for each sailing of each vessel operated pursuant to Agreement No. 9835. That solicitation by each Respondent is only for the account of the Respondent performing the solicitation; for example, Mitsui is only seeking to fill that quarter of the *Japan Ace* which

Mitsui has chartered. The Presiding Officer referred to that practice as multiple solicitation.

In addition to Respondents, several U.S. flag carriers and several third flag carriers serve the Japan-U.S. Pacific Coast trades. The U.S. flag carriers, during the period 1968–1974, were American Mail Line (AML), American President Line (APL), Matson Navigation Company, Pacific Far East Line (PFEL), Sea-Land Service, States Steamship Company, and United States Lines (USL).

In the period 1968 through 1974 American President Line substantially altered the consist of its fleet. In 1968 all APL vessels were breakbulk. In 1968 APL contracted for the construction of four containerships. In 1971 APL determined to make its fleet a totally containerized operation. APL converted vessels acquired in 1966 and 1968 to containerships by the addition of cellularized midbodies. That conversion was largely accomplished in the latter part of 1973 and the beginning of 1974. In 1974 the four containerships contracted for in 1968 were delivered. By the end of 1974 all of the vessels operated by American President Line were fully containerized. American President Line served only California on the Pacific Coast of the United States. American Mail Line, which merged with American President Line in 1973, served only the Pacific Northwest on the Pacific Coast of the United States. The consist of the American Mail Line fleet is essentially the same as that of American President Line.

In the period 1968 through 1974 the Pacific Far East Line also altered the consist of its fleet. In 1968 it operated breakbulk vessels exclusively, with modest ondeck container capacity. That consist continued through the latter part of 1971, when two LASH[1] vessels were added to the fleet. In 1972 66 percent of PFEL's voyages were by LASH vessels. In 1973 the Japan-California service of Pacific Far East Line used LASH vessels exclusively. The LASH vessel, as it was introduced in the latter part of 1971, carried 50 LASH barges and 550 containers (high cube). Those vessels were later modified so as to increase the number of barges and reduce the number of containers carried on each vessel to 63 barges and 334 containers. In 1968 PFEL decided to commit itself to the LASH type of vessel. The phenomenal growth of containerization in the eastbound transpacific trade was not anticipated by PFEL at that time. As of January 1976, PFEL was considering the addition of containerships to its fleet. PFEL sold two of its LASH vessels to Farrell Lines.

In 1968 States Steamship Company operated only breakbulk vessels, which were capable of also carrying some containers on deck. Of the 13 vessels operated by States in 1968, four of them could carry no containers at all. By 1974 States had reduced the number of vessels operated in the

[1] Lighter Aboard Ship. A vessel which carries cargo in barges which may be removed from the vessel and towed through the water. A LASH barge contains 19500 cubic feet of space as compared to 1050 cubic feet of space in a 20-foot container (TEU) or 1200 cubic feet in a "high cube" 20-foot container (a container which is 8.5 feet in height rather than the 8-foot height of the standard TEU). Cargo carried in a LASH barge is breakbulk cargo, so a LASH vessel is a combination breakbulk/container vessel, and is particularly useful in areas with undeveloped or unsophisticated port facilities.

transpacific trade to 10 vessels, all breakbulk. As of September 1975, States was in the process of constructing four roll on/roll off vessels. States did not appreciably alter the consist of its fleet in the period 1968 through 1974.

United States Lines entered the Japan-California trade in earnest in 1970. That line had carried negligible amounts of cargo in that trade in 1968 and 1969 according to Trans-Pacific Freight Conference of Japan/Korea statistics. In 1971 United States Lines carried a large quantity of cargo between Japan (including Okinawa) and California for the Military Sealift Command (MSC). As the U.S. involvement in Viet Nam decreased, so too did the quantity of cargo which USL carried for the Military Sealift Command. In 1971 U.S. Lines carried 35,762 revenue tons of MSC cargo inbound. In 1972 it was 22,619 revenue tons, in 1973 it was 17,498 revenue tons, and in 1974 USL carried only 4,904 revenue tons of MSC cargo inbound. Since 1970, United States Lines has been fully containerized in the Japan-California trades. The Japan-California service of United States Lines is part of the service it provides between Japan and the East Coast of the United States.

With rare exception, Sea-Land Service, Inc. has operated only full containerships in the trade between Japan and the Pacific Coast of the United States. Sea-Land introduced the first of its large vessels of the type SL-7 to the Japan-Pacific Coast trade in May of 1973. As of September of 1975, Sea-Land provided a Japan-California service with five SL-7 vessels.

The following table indicates the share of conference cargoes each of the U.S. and Japanese flag carriers had in the years 1968-1974.

PERCENT OF TPFCJ/K CARGO CARRIED BY RESPONDENTS AND U.S. FLAG CARRIERS

Carrier	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*
America Mail Line	8	8.8	9.6	9.5	9.4	4.4	
American President Line	7.4	7.3	8.6	8.1	8.9	7.3	9.0[a]
Matson Navigation Company	3.5	3.0	3.3				
Pacific Far East Line	6.7	6.7	6.1	5.2	7.0	3.8	2.7
Sea-Land Service	0.2	5.6	13.2	14.7	14.2	14.6	14.7
States Steamship Company	7.3	6.7	8.1	6.8	5.7	4.0	3.9
United States Lines			0.2	3.7	3.3	2.3	2
Japan Line	11.3	10.3	7.8	8.3	9.3	10.4	10.9
Kawasaki Kisen Kaisha	8.5	8.8	7.8	7.2	8.9	11.1	11.1
Mitsui O.S.K. Line	11.0	9.8	8.7	7.8	6.7	7.9	8.7
Nippon Yusen Kaisha	9.9	11.0	9.7	9.1	6.8	9.0	11.1
Showa Shipping Co.	4.6	5.5	5.1	5.6	5.0	5.8	7.6
Yamashita-Shinnihon Steampship Company	11.4	9.5	7.0	7.2	5.5	7.6	9.9

The aggregate share of those conference cargoes carried by the six Respondents in 1968 was 56.7 percent. The aggregate share of the inbound conference cargoes carried by all six Respondents in 1974 was

[a] Includes share of AML, not separately stated in 1974 conference statistics.

59.3 percent. The following Respondents did not carry as great a share of the conference cargoes in 1974 as they did in 1968: Japan Line, Mitsui O.S.K. Lines, and Yamashita-Shinnihon Steamship Company. The other three Respondents carried a greater share in 1974 than they did in 1968. Of Respondents, Yamashita-Shinnihon carried the greatest share in 1968. In 1974 it was Kawasaki and NYK, who each carried 11.1 percent.

The Presiding Officer found that in 1972 Respondents doubled the size of the fleet operated pursuant to Agreement Nos. 9718 and 9731. He further found that that decision, coupled with the other advantages enjoyed by Respondents by reason of those agreements, to be unfair and destructive competition within the conference, particularly in regard to U.S. flag carriers. The Presiding Officer was in error when he found that Respondents in 1972 doubled the size of the fleet operated pursuant to those agreements. The record clearly shows that the decisions were made in early 1970 and 1971, and that the vessels were added to the service in the period between late 1971 and late 1973. Further, as these new containerships were added to the Japan-California trades, Respondents gradually eliminated their older vessels from those trades.

Respondents entered into these agreements so that Respondents could efficiently convert their service in the Japan-U.S. Pacific Coast trades to a fully containerized operation. It was intended from the outset to replace existing vessels with new fully containerized vessels. At the time Respondents decided to build the additional containerships they had available to them the data concerning the utilization of the containerships then in service during the years 1969 and 1970. Those figures showed a high and increasing level of utilization of those vessels. That utilization continued to increase through 1971. Thus, in the process of phasing out older vessels, and phasing in newer vessels Respondents prudently provided for potential trade growth and demand for their vessels, which was reasonable in light of the utilization of those vessels which Respondents had experienced in the earlier years. That the volume of cargo carried in the trade did not increase through 1974 to a degree sufficient to fill Respondents' vessels does not render these agreements unfair. Respondents have, individually and collectively, after transitioning to a fully containerized operation, brought themselves back to the approximate position in the conference which they enjoyed in 1968, prior to the addition of the new fully containerized vessels. That position in the trade alone does not render these agreements unfair.

While it would appear that the efficiency and success of Respondents' coordinated fully containerized service between Japan and the U.S. Pacific Coast, and in particular, between Japan and California, had some effect upon the conference shares held by American President Line, American Mail Line, Pacific Far East Line, States Steamship Company, and United States Lines, Respondents operations were not the paramount cause of the declining shares of those carriers. In 1968, when the trade was largely breakbulk, APL, AML, PFEL, and States enjoyed, on the

average, 7.4 percent each of the conference cargoes eastbound. But, since 1968, the conference trade has become 94.6 percent containerized. APL and AML started to containerize their fleets much later than Respondents. PFEL committed itself to the LASH concept, largely a breakbulk concept. Through 1974, States still adhered to the breakbulk concept. U.S. Lines entered the trades in 1970, and relief heavily upon military cargoes during the Viet Nam conflict. When the availability of those cargoes was sharply curtailed, United States Lines was required to find cargoes elsewhere. Even so, USL had a 2 percent share in 1974, as compared to its .4 percent share in 1968; and Sea-Land increased its share from .2 percent in 1968 to 13.2 percent in 1970 to 14.7 percent in 1974. All of those factors had an effect upon the share of conference cargoes carried by AML, APL, PFEL, and States.

This proceeding has been miscast as a conflict between U.S. flag carriers and Japanese flag carriers. There is no evidence that Respondents concentrated their competitive activities upon U.S. flag carriers. To the contrary, one U.S. flag carrier, providing a fully containerized, commercially oriented, efficient service, Sea-Land Service, Inc., acquired by 1970 a greater share of the inbound conference cargoes than any other carrier in the conference. As of 1974, Sea-Land had increased that share to 14.7 percent of the conference carryings inbound, still the greatest share.

The record does not contain any evidence that Respondents practiced any deceits, or supplanted economic power for the quality of their service. The record does not contain any evidence that any carrier has been excluded from the Japan-U.S. Pacific Coast trades since the inception of Agreement Nos. 9718, 9731, and 9835.

Consequently, the Commission finds that Respondents entered into these agreements to facilitate the transition from a breakbulk to a fully containerized service, that Respondents have recaptured the share of conference cargoes which Respondents enjoyed prior to commencing the transition, and that the conduct of Respondents pursuant to Agreement Nos. 9718 and 9731 in the period 1968 through 1974 has not been shown to have been unjustly discriminatory or unfair as between carriers.

By the means of Agreement Nos. 9718 and 9731 Respondents have reduced the level of competition among themselves. As such, the agreements run counter to the policies, enunciated in the United States antitrust laws, in favor of free and open competition in the marketplace. It is necessary, therefore, to examine what benefits, if any, these agreements confer upon the public, for the Commission will not approve an agreement if it invades the policies enunciated in the antitrust laws more than is necessary to serve the regulatory purposes of the Shipping Act.

Pursuant to Agreement No. 9718 Japan Line, Kawasaki Kisen Kaisha, Mitsui O.S.K. Lines, and Yamashita-Shinnihon Steamship Company each advertise twice weekly sailings between Oakland and Los Angeles on the one hand and Kobe, Tokyo, Yokohama, and Shimizu on the other, a

level of service deemed competitively necessary by those carriers. That offering of service is accomplished by the use of two vessels by each carrier, a total of eight vessels. Absent Agreement No. 9718, each of those four carriers, in order individually to offer that level of service, would have to employ eight vessels in the trade.

Pursuant to Agreement No. 9731, Nippon Yusen Kaisha and Showa Shipping Co. each advertise weekly sailings between Oakland and Long Beach on the one hand and Kobe, Tokyo, Yokohama, and Shimizu on the other, a level of service deemed competitively necessary by those carriers. That level of service is accomplished by the use of two vessels by each carrier, a total of four vessels. Absent Agreement No. 9731, in order individually to maintain that level of service, each of the carriers would have to employ four vessels in the trade.

Contrary to the argument of Petitioner, this record evidences that the competition among Respondents, although diminished, is still real. Except for Showa Shipping Company, in the years 1968 through 1974, both eastbound and westbound, with rare exception, each Respondent carried more revenue tons of its own cargo on its own ships than it did the cargo of any other single party to the agreements. Each Respondent resists allotting to any of the other Respondents any space on its own vessel beyond the standard uniform allotment. Each Respondent vigorously avoids the use of the containers of any other Respondent for the carriage of its cargo. One Respondent's cargo is carried in the container of another Respondent only when an error is made at the terminal, and cargo is mistakenly placed in the wrong container.

Further, Respondents compete with all other carriers in the trades.

The record shows that the transpacific trades, through 1974, had a significant excess of capacity over cargo offered for carriage. These agreements permit Respondents to offer the level of service which they consider competitively necessary, a determination not unreasonable on this record, with substantially less capacity than would be required for each Respondent to individually offer that level of service. The agreements, therefore, tend to ameliorate the overtonnaging problem in the transpacific trades and tend to keep a high number of common carriers in those trades. Both of those results are beneficial to the public, and outweigh the anticompetitive effects of these agreements, demonstrated on this record, sufficiently to justify the continued implementation of these agreements until August 22, 1977, the date upon which Agreement Nos. 9718 and 9731 will terminate in accordance with the amendments now before the Commission for approval.

Consequently, the Commission finds that Agreement Nos. 9718–3 and 9731–5 are not contrary to the public interest or detrimental to the commerce of the United States.

Petitioner alleged at the outset of this investigation that the subject agreements deprived its members of employment. It alleged that deprivation was effected by depriving the steamship companies which employed

the members of Petitioner of cargo by the unfair method of competition employed by Respondents pursuant to the subject agreements.

Petitioner is a union which represents the cooks, bakers, butchers, pastrymen, dining stewards, storekeepers, waiters, waitresses, bartenders, bedroom stewards, bellmen, tailors, photographers, beauticians, librarians, and telephone operators employed by U.S. flag steamship companies based on the Pacific Coast of the United States. Steamship companies involved in this proceeding which employ Petitioner's members are American Mail Line, American President Line, Pacific Far East Line, States Steamship Company, and, for the years 1968 and 1969, Matson Navigation Company. Matson Navigation Company left the Japan-U.S. Pacific Coast trade in 1970. The reason why that company left the trade is not evidenced in this record.

The number of man days worked by union members has substantially decreased between 1968 and 1974. The extent of that decrease has been estimated at 37.8 percent by Petitioner, and 48 percent by Respondents. The decline in union employment is the result of several factors, including the modernization of the equipment utilized by the steamship companies employing Petitioner's members, the transfer of vessels previously employing Petitioner's members to trades other than the Japan-U.S. Pacific Coast trades, and the decline in the share of conference cargo carried by the steamship companies employing Petitioner's members.

The decline in the share of conference cargo carried by the steamship companies employing Petitioner's members was attributable in large part to the increase in the share carried by Sea-Land, which does not employ Petitioner's members. Further, all seafaring positions on privately owned U.S. flag vessels declined by 57.5 percent between January 1, 1968 and January 1, 1975. This record does not demonstrate that Agreement Nos. 9718, 9731 and 9835 are the predominant cause of the decline in union employment.

Even though the success enjoyed by Respondents has contributed to the decline in union employment, Petitioner has not proven, on this record, that Respondents' agreements have been unjustly discriminatory or unfair as between carriers, so Petitioner has not proven that Respondents' agreements have unfairly deprived Petitioner's members of employment.

Both Petitioner and Respondents have moved the Commission to strike portions of each other's briefs in this proceeding. Respondents wish the Commission to strike those portions of notes 1 and 29 of Petitioner's Reply to Exceptions, wherein Petitioner alleges error on the part of the Presiding Officer for admitting Exhibit 2 into evidence in this proceeding. A reading of those notes indicates that Petitioner merely pointed out that it had no opportunity to cross-examine the author of and the persons referred to in the letter admitted as Exhibit 2, and that Petitioner has excepted to the erroneous ruling of the Presiding Officer. It is proper for Petitioner to point out to the Commission that it had no opportunity to

cross-examine the author of Exhibit 2. Petitioner made that point in its arguments advanced against those proffered by Respondents in Respondents' Exceptions. The fact that Petitioner was unable to cross-examine the author of that Exhibit 2 is a factor for the Commission in determining what weight to give to Exhibit 2. Of course, Petitioner was incorrect in stating that it had excepted to the alleged error of the Presiding Officer in admitting Exhibit 2 over its objections. Notes 1 and 29 to Petitioner's Reply to Exceptions will not be stricken.

Respondents also moved to strike five references in Petitioner's Reply to Exceptions on the grounds that the references are to matters not in evidence.[3] Three of the references are to the record in Docket No. 76-14, one is to the files of the Commission, and one is to the vote of the Japanese Government in UNCTAD regarding the Code of Conduct for Liner Conferences. Petitioner argued in response that the Commission could take official notice of these matters.

Litigants before the Commission are required to limit their arguments to evidence of record in the proceeding to which those arguments are directed. Requests for official notice of some fact should be made at a time early enough to permit other litigants to a proceeding to argue the weight of the facts to be officially noticed.

Petitioner's extra record references in its reply were improper, and its request that the Commission officially notice the records of other proceedings, the files of the Commission, and facts generally known, was too late. Therefore, those references in Petitioner's Reply to Exceptions will be stricken. It is worthy of note that, while those references are stricken from the reply of Petitioner, they are stricken in order to preserve fairness in the proceedings before the Commission. The Commission is aware of the records in other proceedings, and the contents of its files. That knowledge is used by the Commission in determining the persuasiveness of arguments made by litigants to the Commission. That is one of the reasons why cases such as this are determined by an administrative agency. The knowledge of arguments, made in different proceedings, that conflict one with the other, is part of the expertise of the Commission.

Petitioner has also moved to strike references in Respondents' Reply Brief before the Administrative Law Judge and Respondents' Reply to Exceptions.[4] The comments regarding the pleadings of Petitioner apply with equal force to the pleadings of Respondents. The references complained of by Petitioner, except for the references in Respondents' Reply to Exceptions at page 30, note 22, and the first sentence of page 20, note 11, will be stricken. The former reference is an objection by Respondents to the reference by Petitioner, in its exceptions, to the data

[3] The specific references wished stricken are: page 14, note 9; page 21, note 14; page 36, lines 11–15, commencing with "As the Japanese Government . . ."; pages 40–41, commencing with "Yet in the affidavit of . . ."; and page 44, note 34, last sentence.

[4] Reply Brief, page 16, notes 7 and 8; pages 17–18; page 26, note 15; and Reply to Exceptions, page 20, note 11; page 30, note 22; and pages 34–35.

contained in Docket No. 76–14, and the latter is a citation to a Commission decision approving an agreement assertedly similar to those at issue in this proceeding. Those two references are proper, and will not be stricken.

Respondents also filed a motion requesting the Commission to take official notice of an affidavit executed by S. Suzuki, a witness in this proceeding, wherein Mr. Suzuki sets forth selected Trans-Pacific Freight Conference of Japan/Korea cargo statistics for portions of 1968, 1975, and 1976. The Commission will not officially notice the affidavit of a witness in a proceeding, filed at the eleventh hour, which contains excerpts, selected by the witness, from a great mass of statistical data.

Lastly, Petitioner has filed a motion requesting the Commission to order Respondents to show cause why their Exceptions and Reply to Exceptions should not be stricken; that Respondents be ordered to file a memorandum with the Commission stating the substance of each *ex parte* communication made to the Commission regarding this proceeding; and that Petitioner be allowed to reply to such a memorandum. The grounds for Petitioner's motion are an allegation that Respondents have made *ex parte* communications to the Commission regarding this proceeding, either directly or indirectly. Petitioner attached to its motion a document alleged to be a true copy of a telegraphic message sent by the Secretary General of the Council of European and Japanese National Shipowners' Associations (CENSA) to CENSA's Washington representative quoting from a telegraphic message purported to be from the Japanese Shipowners' Association to CENSA, (1) representing that Respondents would appreciate it if CENSA members would cooperate in submitting to the Commission an informal protest of the Initial Decision in this proceeding; (2) representing that the Government of Japan had decided to submit a diplomatic representation; and (3) requesting that the members of CENSA approach their respective governments with the view to having those governments make protest to the Commission via diplomatic channels. The Secretary General of CENSA further reported in that message that,

> . . . opportunity has been taken at luncheon today [July 30, 1976] between Chairman of CENSA and Bakke [Chairman of this Commission] to raise a marker on behalf of CENSA as suggested by Japanese. Bakke fully aware of situation and political implications. However, could, of course, give no commitment as matter is sub judice.

Also attached to Petitioner's motion was a copy of an Aide Memoire from the Governments of Belgium, Denmark, Finland, France, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom, objecting to the Initial Decision in this proceeding insofar as it relied upon the promotion of U.S. flag carriers as a factor in the approval of the agreements at issue here, and insofar as the Initial Decision would require, as a condition of approval of Agreement No. 9718–3, that Respondents reduce the number of vessels operated pursuant to Agreement No. 9718 from eight to six.

Respondents replied in opposition to the motion, and attached affidavits

from the Chairman of CENSA, James Gladstone Payne, and the General Manager, International Affairs Division, of the Japanese Shipowners' Association, Seishiro Miyamoto. Those two affidavits represent that, while the Chairman of CENSA lunched with the Chairman of this Commission on July 30, 1976, that luncheon was arranged on June 12, 1976, that Respondents did not ask the Chairman of CENSA to approach the Chairman of this Commission, and that the Chairman of this Commission declined to discuss Docket No. 75-30 with the Chairman of CENSA as the matter was before the Commission for decision.

In addition to the affidavits referred to above, the Chairman of this Commission, Karl E. Bakke, has informed the Commission that, at a luncheon with the Chairman of CENSA on July 30, 1976, the Chairman of CENSA indicated to the Chairman of this Commission that CENSA was concerned about the Initial Decision in Docket No. 75-30; that the Chairman of this Commission immediately replied to the Chairman of CENSA that he could not discuss the merits of nor give any commitment regarding a docketed proceeding before the Commission; and that the matter was immediately dismissed without any further comment from the Chairman of CENSA.

The Aide Memoire referred to above was transmitted to the Commission by the United States Department of State, as was a similar Aide Memoire from the Government of Japan. Those two documents were placed in the correspondence section of the docket binder for this proceeding, the action required by the Rules of Practice and Procedure of this Commission, 46 C.F.R. 502.170. Those two documents have not been, and are not now, part of the record for decision in this proceeding. Neither the Commission nor any of the Commissioners have received any communications extraneous to the record in this proceeding except as identified above and those identified as communications (1) through (3), below.

Since the Chairman of CENSA did not communicate anything on the merits of this proceeding to the Chairman of this Commission, his discussion with the Chairman of this Commission on July 30, 1976 did not contravene Rule 502.170(b)(1) of the Commission's Rules of Practice and Procedure. The two Aide Memoires referred to above are *ex parte* communications, and received proper disposition at the Commission.

Since this Report completely discloses to Petitioner the substance of each and every representation made to the Commission regarding this case, extraneous to the record, it is not necessary to require Respondents to file a detailed memorandum regarding those representations. Therefore, the second request for relief by Petitioner will be denied.

Because the two Aide Memoires referred to above are part of the public docket file of this proceeding, in accordance with the rules of the Commission, and because the Commission has not relied upon, or given favorable consideration to, those Aide Memoires in deciding this case, and because Petitioner was aware of the July 30, 1976 luncheon between

the Chairman of CENSA and the Chairman of this Commission at the time Petitioner filed the instant motion, it is not necessary that Petitioner be allowed an opportunity to reply to the formal disclosures contained in this Report. Therefore, Petitioner's third request for relief contained in its motion will be denied.

The first item of relief requested by Petitioner in its motion, to wit: that Respondents' Exceptions and Reply to Exceptions be stricken, will also be denied. It is not necessary to decide in this proceeding, relying only on the affidavits filed by Petitioner and Respondents, what part, if any, Respondents, or their counsel, had in causing the two Aide Memoires referred to above to be transmitted to this Commission. If Respondents had caused *ex parte* communications to be made to the Commission regarding this proceeding, the Government in the Sunshine Act, P.L. 94–409, would permit the Commission to disapprove Respondents' agreements, or to strike Respondents' Exceptions and Reply to Exceptions. However, that statute changes the law, and will not be effective until March of 1977. There being no other authority cited to the Commission, Petitioner's motion for an order to show cause will be denied.

In the final hours of the effort to prepare this Report the Commission received:

(1) A letter, dated September 27, 1976, from executives of American Export Line, Inc., American President Line, Lykes Brothers Steamship Company, Inc., Pacific Far East Line, Inc., Sea-Land Service, Inc., States Steamship Company, United States Lines, Inc., and Waterman Steamship Corporation, all U.S. flag carriers not party to this proceeding, urging the Commission to extend its interim approval of Agreement Nos. 9718–3, 9731–5, and 9835–2 to March 6, 1977, so as to permit those carriers to more effectively negotiate with Respondents with a view towards establishing a revenue pool in the transpacific trades.

(2) A letter, dated October 18, 1976, from executives of each of Respondents complaining of the September 27, 1976 letter from the U.S. flag carriers referred to above, and urging the Commission to disregard that letter.

(3) A letter, dated October 22, 1976, from counsel for Petitioner urging that the Commission not continue its interim approval of Respondents' agreements, as urged by the U.S. flag carriers in their September 27, 1976 letter, and, in the alternative, urging the Commission, if it should approve Respondents' agreements on November 1, 1976, to stay the effective date of that order pending the outcome of negotiations regarding a revenue pool in the Pacific.

(4) A document, filed October 26, 1976, from counsel for Respondents entitled "Reply to Petitioner's Requests to Stay Final Approval Pending Negotiation Of A Bilateral Pool Or To Adjudge The Rights Of Nonparties Contingent Upon Reconsideration".

(5) A document, filed October 26, 1976, entitled "Reply to Petitioner's Request To Treat Respondents' Motion Entitled 'Modification Of Objec-

tion Relative To 1975 Data, Etc.' As a Motion to Reopen the Record Under Commission Rule 13(j)".

Communications (1) through (4) are extra-record, unacceptable, an abuse of the administrative process, are rejected by the Commission, and have not been considered by the Commission in arriving at the decision in this proceeding. Communication number (5) is frivolous, approaches abuse of the administrative process, and is rejected.

The Commission ultimately finds and concludes that, on this record: Respondents do not have a monopoly in the Japan-U.S. Pacific Coast trades; Agreement Nos. 9718 and 9731 have not been unjustly discriminatory or unfair as between carriers; Respondents have not unfairly deprived the members of the Marine Cooks and Stewards Union of employment; and Agreement Nos. 9718 and 9731 secure benefits to the public which outweigh the demonstrated anticompetitive effect sufficiently to justify the continuation of those agreements until August 22, 1977. Consequently, Agreements Nos. 9718–3 and 9731–5 will be approved. An appropriate order will be entered.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–30

AGREEMENTS NOS. 9718–3 AND 9731–5

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter, and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof:

IT IS ORDERED, That, pursuant to section 15 of the Shipping Act, 1916, Agreement Nos. 9718–3 and 9731–5 are approved;

IT IS FURTHER ORDERED, That Petitioner's September 30, 1976, "Motion for Consolidation and Request for Oral Argument" is denied;

IT IS FURTHER ORDERED, That Petitioner's September 16, 1976, "Motion for Order to Show Cause and for other Relief" is denied;

IT IS FURTHER ORDERED, That the following references in Petitioner's Reply to Exceptions, filed July 29, 1976, are stricken:

(1) Page 14, note 9;

(2) Page 21, note 14;

(3) Page 36, lines 11–15 commencing with "As the Japanese Government . . .";

(4) Page 40, commencing with "Yet in the affidavit of. . .";

(5) Page 41, lines 1–13; and

(6) Page 44, note 34, last sentence;

and, that, except to the extent herein expressly granted, Respondents' July 29, 1976, "Motion to Strike and for other Relief" is denied;

IT IS FURTHER ORDERED, That the following references in Respondents' Reply Brief before the Administrative Law Judge dated March 24, 1976, are stricken:

(1) Page 16, notes 7 and 8;

(2) Page 17, second paragraph, last sentence, commencing "The Maritime Subsidy Board,. . .";

(3) Page 18, quoted paragraph, commencing "In 1970 the Japanese-flag. . .";

(4) Page 26, note 15, last sentence;

and that the following reference in Respondents' Reply to Exceptions, filed July 28, 1976, is stricken: Page 20, note 11, second and third sentences; and that, except insofar as herein expressly granted, Petitioner's August 2, 1976, "Motion to Strike" is denied; and

IT IS FURTHER ORDERED, That Respondents' October 18, 1976, "Motion To Take Official Notice" is denied.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-25

TRANE COMPANY

v.

SOUTH AFRICAN MARINE CORP. (N.Y.)

NOTICE OF ADOPTION OF INITIAL DECISION

November 4, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 4, 1976.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-25

TRANE COMPANY

v.

SOUTH AFRICAN MARINE CORP. (N.Y.)

Adopted November 4, 1976

A complaint which fails to name as respondent a common carrier by water or other person subject to the Shipping Act, 1916, or to allege violation of section 18(b)(3) of that Act by a common carrier by water or conference of such carriers, the only persons liable under that law, is jurisdictionally defective and must be dismissed.

The naming of a carrier's agent as respondent in a complaint which alleges a violation of section 18(b)(3) of the Act without naming the carrier-principal involved is jurisdictionally defective regardless of the agent's authority to act on behalf of its principals located overseas.

A complainant in a case seeking reparation for overcharges must show either that it paid the freight or that it has succeeded to the claim by assignment or other legitimate means. The mere fact that the complainant is the owner of the party paying the freight, without more, does not confer standing to seek reparation.

Amendments to complaints to cure non-jurisdictional defects or defects unrelated to the substance and gravamen of the complaint are permitted under the Commission's rules. Substantial changes to complaints which not merely add parties but substitute different and indispensable parties are in reality new complaints.

William Levenstein for complainant.

David A. Brauner for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

The Original Complaint

By complaint filed and served May 7, 1976, complainant Trane Company alleged that respondent South African Marine Corp. (N.Y.) was paid freight in excess of that provided in respondent's tariff on two shipments of air conditioning equipment allegedly transported by respondent from New York to Capetown, South Africa, in the years 1974 and 1975. Complainant alleged that it had been subjected to the payment of

[1] This decision became the decision of the Commission November 4, 1976.

charges for transportation which were in excess of those lawfully applicable, in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817 (the Act).[2] Complainant sought reparation in the sum of $1,989.07 or such other proper sum together with any other appropriate order warranted in the premises.

The complaint alleged that the Trane Company is a company incorporated in the State of Wisconsin and located in La Crosse, Wisconsin, whose principal business is the marketing of air conditioning and refrigeration equipment. Complainant furthermore alleged that respondent is a "common carrier by water engaged in the transportation of cargos (sic) between the United States and South and East Africa." Complainant furthermore alleged that "[a]t the time of the shipments here involved, respondent was a member of the United States/South and East Africa Conference and a party to that conference's tariffs."

The facts concerning the two shipments which gave rise to this controversy are as follows. Under bill of lading No. 128, dated June 21, 1974, there occurred a shipment described on the bill of lading as "98 Bxs. Air Conditioning Machinery" weighing 40,431 pounds which was carried from New York to Capetown on the vessel *S.A. Nederburg*. For this shipment payment was made on the basis of a rate plus surcharge published in the Conference tariff applicable to "Machinery, Air Conditioning" amounting to $3,153.16.[3] Complainant alleged that the shipment actually consisted of 98 boxes of "copper tube" and should have been charged the commodity rate for that item under the tariff, which, according to complainant's calculation, would have required only $2,789 in freight. Therefore, complainant claimed an overcharge in the amount of $364.16 on this shipment ($3,153.16 less $2,789). This calculation, as corrected, however, should be $364.51.[4]

On the second shipment, under bill of lading No. 238, dated February 28, 1975, the shipment was described as "50 Bxs. Air Conditioning Machinery (Copper Tube for the Local Manufacture of Trane Heating and Cooling Soils, (sic) Not Domestic)" weighing 20,339 pounds from New York to Capetown on the vessel *Aegis Faith*. Payment was made on the basis of the published rate plus two surcharges applicable to

[2] Section 18(b)(3) provides in pertinent part that:

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time.

. . .

[3] The rate charged was $109 per 40 cubic feet plus a surcharge of $17 for 40 cu. ft. See South and East Africa Conference, South Bound Freight Tariff No. 1, F.M.C. No. 12, 10th revised page 276, Item No. 2130, effective March 5, 1974. At 1001 cu. ft. shown on the bill of lading for the shipment plus the surcharge the total freight amounts to $3,153.16 ($2,727.73 plus $425.43).

[4] The rate for "copper tube" was $137.50 per weight ton (2,240 lbs.). Conference tariff, cited above, fourth revised page 186, Item No. 930, effective March 5, 1974. At 40,431 lbs. shown on the bill of lading for the shipment plus the surcharge ($17 per 2,240 lbs.) the total freight would amount to $2,788.65. ($2,481.81 plus $306.84). Therefore, the overcharge would be $364.51 ($3,153.16 less $2,788.65).

"Machinery, Air Conditioning," amounting to $3,575.39.[5] Complainant alleged that the shipment actually consisted of 50 boxes of "copper tube" and should have been rated as such in accordance with the specific commodity rate published for that item in the tariff. If so, the freight would have been only $1,950.48.[6] Therefore, complainant claims an overcharge in the amount of $1,624.91 ($3,575.39 less $1,950.48).

The total overcharge for the two shipments alleged by complainant amounted to $1,989.07 ($364.16 plus $1,624.91). As corrected, the amount would be $1,989.42 ($364.51 plus $1,624.91).

Complainant requested with respondent's subsequent concurrence that this controversy be decided under the Commission's shortened procedures as provided by Rule 11, 46 CFR 502.181 et seq, that is, on the basis of memoranda of facts and arguments submitted in writing, without oral hearing. In support of its claims that both shipments consisted solely of copper tubes, complainant submitted for the first shipment (bill of lading No. 128) a copy of the original invoice and the pertinent export declaration in addition to the bill of lading itself. For the second shipment (bill of lading No. 238) complainant submitted a copy of Trane's export packing tally in addition to the bill of lading.

Respondent's Original Answering Memorandum

In its original answering memorandum, respondent did not dispute complainant's allegations regarding the nature of complainant's business nor the fact that the shipments were made and billed as complainant alleged nor even that the shipments consisted of copper tubes. Nor did respondent dispute complainant's allegation that respondent South African Marine Corporation (N.Y.) was a common carrier by water, a member of the United States/South and East Africa Conference, and a party to that conference's tariff. Respondent made no mention of the fact that complainant did not establish that complainant had paid the freight although the bills of lading themselves suggested that the consignee, not the shipper-complainant had paid.[7] Nor did respondent challenge the allegation that "respondent carried complainant's shipment" in both instances.[8]

[5] The rate charged was $125.25 per 40 cubic feet plus a $17 per 40 cubic foot surcharge and a 25 percent surcharge applied to the base rate. See United States/South and East Africa Conference, South Bound Freight Tariff No. 2, F.M.C. No. 3, original page 237, Item No. 2130, effective January 1, 1975. At 824 cubic feet shown on the bill of lading, the total freight amounts to $3,575.39.

[6] The rate for "copper tube" was $158.25 per 2,240 lbs. plus two surcharges ($17 per 2,240 lbs. and 25 percent of the base rate). See Conference tariff, cited in previous footnote, original page 174, Item No. 930, effective January 1, 1975. At 20,339 lbs. shown on the bill of lading, the total freight amounts to $1,950.48.

[7] In both shipments, the complaint alleged that "respondent billed and was paid charges . . ." without specifying who paid the charges. Further on, the complaint alleged that "complainant has been subjected to the payment of charges . . ." (Paragraph IV). The bills of lading submitted with the complaint, however, contain the notation "ocean freight collect," which suggests that the consignee in South Africa paid the freight rather than the shipper-complainant located in the United States. Subsequently, it was asserted with the filing of an amended complaint that the consignee did indeed pay the freight.

[8] Respondent's defenses consisted of a variety of arguments relating to tariff rules barring claims or requiring

The Amended Complaint

Although Rule 11 procedures are designed to enable the presiding judge to issue a decision on the basis of pleadings and supporting factual memoranda and materials, my initial examination of these materials revealed obvious deficiencies which inexplicably escaped the notice of the parties. Accordingly, I conducted a special conference with the parties in order to explain these deficiencies and discrepancies and allow the parties an opportunity to remedy the situation. Since one of the deficiencies involved a jurisdictional-type problem which might well have barred any award of reparation, the chief beneficiary of this conference was obviously complainant.

The problem of a jurisdictional nature concerned the failure of the original complaint to establish that complainant had paid the freight or had otherwise validly succeeded to the claim. This goes to the issue of standing to recover reparation, although not to standing to file a complaint not seeking reparation. See *Ace Machinery Company v. Hapag-Lloyd A G*, Docket No. 76-5, Order Denying Motion to Vacate, August 4, 1976, pp. 6, 7; *Colgate Palmolive Co. v. Grace Lines, Inc.*, 11 SRR 982 (1970); *Isthmian S.S. Co. v. United States*, 53 F. 2d 251, 253 (S.D.N.Y. 1931); *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 9 F.M.C. 211 (1966).[9]

There were additional problems and discrepancies in the materials submitted however. For example, regarding the first shipment, the description of the commodity shipped differed as between the invoice and the export declaration, and weight and measurement figures on the export declaration did not correspond with such figures on the bill of lading. Furthermore, regarding the second shipment, complainant furnished no export declaration which might have explained the discrepancy between the bill of lading and export packing tally descriptions. See Notice of Rulings Made During Special Conference, cited above, pp. 2, 3. There

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adherence to bill of lading descriptions, shipper's negligence and unwarranted attempt to vary the terms of a contract of carriage, encouragement of continued shipper negligence and of an entire industry processing small overcharge claims, excessive costs both to carriers and the Commission to hear and determine these cases, and unfairness to the carrier who is unable to determine what moved so long after the fact. Complainant's original reply to these arguments cited decisions invalidating the tariff rules cited by respondent and characterized the remainder of respondent's arguments as constituting a "clear demonstration of the arrogance with which this carrier approaches over-charge claims." Complainant also argued that the bill of lading was the carrier's own document required to be issued under the Harter Act (46 U.S.C. 193), miscited by complainant as "49 U.S.C.," and that the bill of lading on the second shipment itself shows that copper tubes were shipped, as complainant alleged.

[9] It has long been recognized, as the cases cited show, that "any person" may file a complaint under section 22 of the Act whether or not such person has suffered injury. However, to seek reparation a person must show injury and proof of pecuniary loss. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 310 (1934), *West Indies Fruit Co. v. Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962). Also the complainant must show that it has suffered real damage. *Ballmill Lumber & Sales Corp. v. The Port of New York Authority*, 11 F.M.C. 494, 510-11 (1968). In a claim for refund of overcharges such as in this case, the complainant must show that he has paid the freight or has succeeded to the claim in a valid fashion such as by assignment. *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, cited above, 9 F.M.C. at pp. 212-213; 215-216. No authorities have been cited to me holding that a parent corporation, without more, has standing to seek recovery of damages suffered by its wholly owned subsidiary corporation, as the original parent corporate complainant seems to believe. One wonders, would the parent also be willing to stand trial for its wholly owned subsidiary corporation if that subsidiary were accused of violating the law and would the parent be willing to suffer the penalties required by law on behalf of its subsidiary?

were also minor arithmetic errors in computation of the alleged overcharge, as discussed above.[10]

As a result of the special conference, I granted complainant leave to file an amended complaint naming the real party in interest as complainant and to explain the various discrepancies discussed above. In so doing, I overruled respondent's objections that complainant had submitted his case and was not entitled to further opportunity to fortify and clarify it. I explained my reasons and cited appropriate authorities for these rulings. See Notice of Rulings Made During Special Conference, cited above, pp. 4, 5.[11]

Pursuant to these rulings, an amended complaint was filed and served on September 2, 1976, in the name of Trane Southern Africa (Pty) Ltd. as complainant. This time complainant seeks $1,989.04 in reparation instead of $1,989.07 requested in the original complaint. However, as in the first complaint, there are again errors in computation.[12]

The amended complaint alleges that complainant Trane Southern Africa (Pty) Ltd. is a corporation organized under the laws of South Africa located in Johannesburg, South Africa, and that it is a wholly owned subsidiary of the Trane Company of La Crosse, Wisconsin (the original complainant). In an attached memorandum of facts it is stated that Trane Southern Africa was the consignee of the two shipments involved herein and "paid respondent the ocean freight charges it billed." In addition to the export declaration and invoice originally submitted, complainant has now submitted an export packing tally as well as other materials. For the second shipment, in addition to the export packing tally and bill of lading originally submitted, complainant has submitted the pertinent export declaration, the invoice and declaration of value, an affidavit of the traffic manager of the shipper (Trane Company) and a notarized certificate by the same man stating that the export declaration had listed an incorrect

[10] There was in addition a typographical error in the complaint with regard to the second shipment. This related to the listing of a "$25" surcharge. The correct entry should have been "25 percent" surcharge.

[11] In the rulings cited, I acknowledged that there comes a time when the record in an administrative proceeding must be closed and reopening can no longer be tolerated, citing *Flota Mercante Grancolombiana v. F.M.C.*, 373 F. 2d 674, 679 (D.C. Cir. 1967) and *I.C.C. v. Jersey City*, 322 U.S. 503, 514–15 (1943). However, both this Commission and the courts have stated that they expect trial judges to help ascertain the truth and not merely sit by passively calling balls and strikes. I cited numerous cases for this proposition, such as, *Madeplac S.A. Industria de Madeiras v. Figueiredo Navegaco, S.A. alkla Frota Amazonica, S.A.*, Docket No. 74–45, Order on Remand, July 20, 1976, *European Trade Specialists, Inc. et al. v. Prudential-Grace Lines, Inc. et al.*, Docket No. 74–8, May 28, 1976, p. 24, *Scenic Hudson Preservation Conf. v. Federal Power Commission*, 354 F. 2d 608, 620 (2d Cir. 1965), *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D.N.Y. 1951).

[12] As I pointed out earlier, for the first shipment the correct computation for overcharge would be $364.51, not $364.16, which latter amount is shown on both the original and amended complaints. For the second shipment, the correct computation for overcharge would be $1,624.91, not $1,624.88 shown on the amended complaint. The original complaint had actually shown the correct calculation of the overcharge for this shipment ($3,575.39 less $1,950.48; original complaint, p. 3). The correct total overcharge for both shipments would be $1,989.42, not $1,989.07 shown in the original complaint nor $1,989.04 in the amended complaint. ($364.51 plus $1,624.91). Although minor errors, the continued appearance in the amended complaint of such mistakes is not commendable especially since some of these mistakes are obvious on the face of the complaint. For example, on page three of the amended complaint where the allegedly proper charge for the second shipment is calculated, the figures $1,439.90, $359.25, and $154.36, are shown as totalling $1,950.51 (instead of $1,953.51) and 25% of $1,439.90 is shown as $359.25 (instead of $359.98). In a case arising under section 18(b)(3) of the Act it is important to make sure that a carrier charges no more or less than what is specified in its tariffs and practitioners before the Commission ought to exercise some care before submitting or agreeing to calculations which may form the basis for an award of reparation.

Schedule B number. All of these materials, complainant alleges, support its contention that copper tubes were the sole commodity involved in the two shipments at issue.

Respondent's Answering Memorandum to Amended Complaint

To a large extent respondent repeats its earlier arguments regarding its reliance on tariff rules to deny the claims as well as the shipper's negligence and attempts to vary the terms of its contract, costs and burdens on carriers and the Commission to process and hear such claims, etc. Again respondent does not deny that the shipments were made and billed as complainant describes them and has no comment to make regarding the complainant's allegations that respondent is a common carrier by water, a member of the United States/South and East Africa Conference, and a party to that conference's tariffs. Respondent does argue, however, that the original complaint should have been dismissed for lack of standing of the original complainant to recover reparation since, as is now acknowledged, the original complainant did not pay the freight. At best, argues respondent, the amended complaint should be treated as a new proceeding, in which case the first claim involving a shipment occurring in June 1974, should be dismissed as having arisen beyond the two-year period of limitations contained in section 22 of the Act. Respondent also argues on the merits of the controversy that the supporting evidentiary materials are in effect unreliable and do not satisfy the heavy burden of proof that complainants in such cases as this have.

Complainant's reply memorandum again cites Commission decisions denying the validity of defenses based upon time-based tariff rules and permitting shippers to show what actually moved regardless of bill of lading descriptions. Complainant again contends that the bill of lading is the carrier's document required by the Harter Act (again miscited by complainant as 49 U.S.C. 193, instead of 46 U.S.C. 193). Complainant furthermore disputes respondent's contention that the Commission's rules do not permit the filing of amended complaints, citing "Rules (j) 502 C.F.R. 502.70." (Amended Complaint, p. 2).[13] Complainant disputes respondent's contention that the original complaint should have been dismissed for lack of standing on the ground that as the sole owner of the corporate consignee who paid the freight, the original complainant did indeed have standing which could have been shown if I had not permitted the filing of an amended complaint.

Although, as I noted previously, it appears to me that a person who has not paid the freight or who is not a valid assignee of a claim has no standing to recover reparation although he may file a complaint alleging

[13] The correct citation should be to Rule 5(j), 46 CFR 502.70. This rule provides in pertinent part:

Amendments or supplements to any pleadings will be permitted or rejected in the discretion of the Commission if the case has not been assigned to a presiding officer for hearing; otherwise in the discretion of the officer designated to conduct the hearing. . . . The presiding officer may direct a party to state his case more fully and in more detail by way of amendment.

violations of the Act, in view of the fatal flaw in both the original and amended complaints, both of which, it now appears, fail to name a common carrier as respondent, it is unnecessary to decide the issue of complainants' respective standings. In short, it appears that the original complaint was filed by a shipper-complainant having no standing to be awarded reparation against a carrier's agent with no cognizable status under section 18(b)(3) or 22 of the Act, thus, as far as reparation claims under the Act are concerned, the controversy involved nobody vs. nobody. The amended complaint, while appearing to give standing to a consignee-complainant who at least paid the freight, again names a carrier's agent as respondent, in other words, as far as reparation claims under the Act are concerned, it involves somebody vs. nobody. I now elaborate.

DISCUSSION

The critical issue for decision which will determine whether I can consider the merits of this controversy and determine if reparation should be awarded in any amount is whether the failure of a complaint to allege that a common carrier by water subject to the jurisdiction of the Act has violated section 18(b)(3) of the Act is a basic defeat which deprives the Commission of jurisdiction to determine the controversy. A subsidiary issue is whether the naming of an agent of such common carrier suffices to confer jurisdiction. For the following reasons, I must conclude that the complaint is jurisdictionally defective and that both the original and amended complaints should have been dismissed at the outset for that reason.

The basic authority of the Commission to entertain complaints stems from section 22 of the Act, which states in pertinent part:

> That any person may file with the Commission a sworn complaint setting forth any violation of this Act by a *common carrier by water, or other person subject to this Act,* and asking reparation for the injury, if any, caused thereby. The Commission shall furnish a copy of the complaint to such carrier or other person. . . . 46 U.S.C. 821. (Emphasis added.)

Both the original and amended complaints name "South African Marine Corp. (N.Y.)" as respondent and allege that this company is a common carrier by water, a member of a named Conference of such carriers, and even a party to that Conference's tariffs. In both the original and amended answering memoranda, the named respondent does not dispute these allegations. The only problem of a jurisdictional nature that appeared obvious from the pleadings and materials submitted, as I have discussed, was that the shipper-complainant named in the original complaint did not appear to have paid the freight and therefore lacked standing to seek reparation. This problem was cured by permitting the filing of an amended complaint in which it was confirmed that the original shipper-complainant had not paid the freight, which was paid by the consignee in whose name

the amended complaint was now filed. There was no further indication of any other jurisdictional defect and considering the fact that respondent did not dispute the erroneous allegations regarding the status of the named respondent, I had no cause to question the status of "South African Marine Corp. (N.Y.)." It was only after complainant's final reply was filed that I became aware that this named respondent is not a common carrier at all but the general agent of three common carriers, to wit, South African Marine Corporation Ltd., Springbok Line, Ltd., and Springbok Shipping Company, Ltd.[14]

Not only, therefore, do both complaints not name or allege a violation by a common carrier as required by section 22 of the Act but they ask for a finding of violation of section 18(b)(3) of the Act which by its terms is limited to common carriers or conferences of such carriers, stating in pertinent part:

> No *common carrier by water in foreign commerce or conference of such carriers* shall charge or demand or collect a greater or less or different compensation for the transportation of property . . . than the rates and charges which are specified in *its tariffs* on file with the Commission. . . . 46 U.S.C. 817. (Emphasis added.)

A carrier's agent such as the named respondent in both complaints does not transport property, is not a party to a Conference agreement consisting of carriers, and has no tariff of its own. It is the carrier principal, not the agent, that does these things and stands liable for violations of section 18(b)(3) or for any section of the Act for which standards of conduct are imposed on such carriers. There is no doctrine that the carrier may stand aloof while the agent assumes full responsibility for violation of the carrier's duties under the Act. See *Hellenic Lines, Ltd.—Section 16 (First) and 17 Violations*, 7 F.M.C. 673 (1964), *Cont. Distrib'g Co., Inc. v. Cia. Nacional De Nav.*, 2 U.S.M.C. 724, 725 (1945).[15] Indeed, the very bills of lading submitted in this case state on their face a clear disclaimer by South African Marine Corporation (N.Y.),

[14] These facts were stipulated by the parties in *Caterpillar Overseas, S.A. v. South African Marine Corp. (N.Y.)*, Docket No. 76-39, in a document filed in that case signed by counsel for the parties on September 22 and 23, 1976. The names of the true carriers are also shown on the pertinent tariffs and on the back of the bills of lading issued on behalf of these carriers by South African Marine Corporation (N.Y.) as agents. These facts are therefore officially noticeable. Rule 13(f), 46 CFR 502.226. The bills of lading submitted in the present case were xerox copies of one side only which did not show the names of the carriers on the back side. The front page of the bill of lading, however, does contain the notation "Ship operated for account of:" and shows a barely legible group of stamped letters and numbers which on close inspection shows that the first shipment (bill of lading No. 128) was carried by "carrier no. 2" (Springbok Line, Ltd., according to the back side of the bills of lading filed in Docket No. 76-39). The second shipment (bill of lading No. 238) was carried by "carrier no. 1" (South African Marine Corporation, Ltd., according to the same source). South African Marine Corporation, Ltd., the carrier, is not to be confused with South African Marine Corporation (N.Y.), the agent and named respondent in the present case. See Docket No. 76-39, cited above, Initial Decision, September 30, 1976.

Since counsel for complainant who signed the abovementioned stipulation is also counsel for complainant in the present case and the same firm represents the named respondent in both cases but these facts regarding the status of the named respondent was not brought to my attention by counsel, apparently counsel foresaw no legal significance to these facts. Otherwise, I presume they would have brought such facts to my attention.

[15] In the *Hellenic* case, the carrier unsuccessfully tried to avoid liability for violations of sections 16 First and 17 of the Act by arguing that its agent in Djibouti, French Somaliland, had been responsible. The carrier, of course, was named as respondent. In *Cont. Distrib'g Co., Inc.*, the Commission flatly held that two companies named as respondents were "agents and, as such, are not subject to the act." 2 U.S.M.C. at p. 725.

the agent named as respondent in this case, of any carrier liabilities, the agent stating:

Neither South African Marine Corporation (N.Y.) nor any other person, firm or corporation other than the carrier, whether or not the name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Whatever may be the authority of the general agent named as respondent in this case to act on behalf of its principals, therefore, I cannot find such an agent in violation of a statute which names only carriers and conferences of carriers nor can I find a carrier in violation of such statute who has not been named in the complaint and, indeed, has been nowhere identified in any of the pleadings or materials submitted in the case. Whatever the consequences of dismissal of the subject complaints, the defect is basic and jurisdictional and justifies dismissal.

The Reason for Dismissal Rather than Further Amendment

I am aware of the fact that the Commission is an administrative agency and not a court and that the Commission has recognized that it "ought not to be hampered in its proceedings by the hard and fast rules as to pleading and practice which govern courts of law . . . and that inquiries should not be too narrowly constrained by technicalities." *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934). In this spirit the Commission has permitted a complainant to cure a defective complaint which failed to contain the seal of a notary public to attached affidavits without being barred by the two-year period of limitations in section 22 and even permitted complainants to cure a defective complaint which had not even been verified or sworn to when initially filed so as not to lose their rights under the two-year period of limitations. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, cited above; *Gillen's Sons Lighterage v. American Stevedores*, 12 F.M.C. 325, 331, note 6 (1969), referring to the Examiner's rulings reported in 10 SRR 195 (1968).[16] The Commission has also held that a complaint which was originally defective because it chose an incorrect remedy but correctly stated the substance or gravamen of the claim could be cured subsequently even if the period of limitations had meanwhile expired. *Heterochemical Corp. v. Port Line,*

[16] In the rulings referred to, the Examiner had held that the requirement that a complaint be verified and sworn to as provided by section 22 of the Act was not a jurisdictional one in the strict sense but a defect which could be cured subsequently even if the two-year period of limitations had run in the meantime. He distinguished this type of requirement as being designed to protect the Commission from pursuing reckless or false claims as distinct from non-waivable jurisdictional requirements such as the two-year period for filing which extinguishes claims and is designed to "cut off liability for stale claims." 10 SRR at p. 198. See also *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471–72 (1968), *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). Curiously, his ruling is contrary to that of the Commission's predecessor in *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938), which held that the "sworn-to" requirement is jurisdictional and cannot be cured subsequently if the statutory two-year period has expired in the meantime. The Examiner recognized his departure from *Reliance Motor* and suggested "that this Commission is not bound by its predecessor's decision." 10 SRR at p. 197. He cited numerous authorities for his ruling. In adopting the Examiner's decision, the Commission made no mention of this ruling, which was referred to in a footnote in the Examiner's decision. In any event, there was no dispute that the two-year period of limitations is jurisdictional and the issues did not involve the failure to name an indispensable jurisdictional party.

Ltd., 12 SRR 223 (1971). In all of the above cases, however, the respondents named in the complaints were carriers or persons subject to the Act capable of violating the various provisions of that Act involved. It is one thing to permit an amendment to a complaint which merely affixes a notary's seal, adds a supporting sworn statement, or alters the type of relief requested without changing the essential nature of the cause of action or the respondents involved. It is quite something else to name a totally different respondent. The latter "amendment," in my opinion, constitutes a new proceeding and goes beyond the type of amendments permitted by Rule 5(j), 46 CFR 502.70. Cf. the recent changes to the Commission's rules which now authorize presiding judges to "amend" Commission orders of investigation but which clearly state that such authority cannot be used to add parties to the proceeding. *Rules of Practice and Procedure,* Docket No. 76-27, 16 SRR 1387, 1388 (1976), amending Rule 10(g), 46 CFR 502.147(a). Cf. also *Carolina Cotton & Woolen Mills Co. v. Southern Ry. Co.*, 195 I.C.C. 654, 658 (1933), where the I.C.C. held that a complaint which failed to name as complainant one who had paid the charges or had a valid assignment of the claim was improperly filed and not "cognizable" by that Commission.[17]

For these reasons as well as those discussed above, I conclude that dismissal is the appropriate action rather than leave to file a further amended complaint.

ULTIMATE CONCLUSION

The original complaint filed in this proceeding alleging an overcharge in violation of section 18(b)(3) of the Act failed to establish even with the supporting documentation that complainant had paid the freight or had validly succeeded to the claim, prerequisites to the seeking of reparation. The amended complaint substituted a new complainant which, it was asserted, had paid the freight. In both complaints, however, neither a common carrier by water or other person subject to the Act was named as respondent, the named respondent being the agent of three unnamed carriers. This failure to name a jurisdictionally indispensable party is fatally defective and requires dismissal of both complaints, regardless of the authority of the carrier's general agent to act on behalf of its

[17] Since both the original and amended complaints in this case must be dismissed because of failure to name an indispensable jurisdictional party as respondent, my earlier ruling permitting the filing of an amended complaint is academic. However, *since the amended complaint* did not merely explain the status of complainant or confirm its standing to seek reparation but rather replaced the complainant with a wholly new party it now appears to me that the use of Rule 5(j) was inappropriate. In cases in which new complainants are named who have received valid assignments of claims, the corrected complaints are treated as "new or supplemental" at the time of filing the corrected complaint and if the statute of limitations has meanwhile expired, the new complaint may be time barred. *Cf. Carolina Cotton & Woolen Mills Co. v. Southern Ry. Co.*, cited above, where the I.C.C. treated the original complaint in which complainant had neither paid the freight nor held an assignment of the claim as not "cognizable." 195 I.C.C. at pp. 658, 659. In *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 5 SRR 609 (1964) and 829 (1965) this Commission similarly treated the filing of an assignment as starting a new complaint even though there was no change in complainants. Even in *Chr. Salvesen & Co. Ltd. v. West Michigan D. & M. Corp.*, 9 SRR 1154 (1968), where the Examiner seems to go the other way, the amended complaint essentially only clarified the status of the originally named comlainant-manager who had shown that he had authority to prosecute the claim at the very beginning on behalf of the owner of the vessel involved.

principals. Furthermore, the mere fact that a complainant is the sole owner of a subsidiary corporation which paid the freight is not enough to confer standing to recover reparation.

Amendments to complaints are liberally permitted under the Commission's rules so as to protect rights which might expire under the two-year period of limitations contained in section 22 of the Act. Amendments which have corrected defects such as omitting signatures, seals, or sworn statements or selecting incorrect remedies or measures of damages have been permitted by the Commission in the interest of justice and in the spirit of administrative flexibility. However, amendments which do not merely add parties having a community of interest with an original complainant to a suit properly brought but substitute different parties, especially when such parties are jurisdictionally indispensable, are not merely clarifying amendments but new complaints which should be so treated despite the possible effects of the period of limitations contained in section 22 of the Act. Cf. *Kam Koon Wan v. E.E. Black, Limited,* 75 F. Supp. 553, 564–65 (D. Hawaii 1948), affirmed, 188 F. 2d 558, cert. denied 342 U.S. 826.

Accordingly, the subject complaints are hereby dismissed.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
October 7, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 330(I)

CUMMINS ENGINE CO., INC.

v.

UNITED STATES LINES, INC.

NOTICE OF ADOPTION

March 10, 1976

The Commission by notice served March 10, 1976, indicated it had determined to review the initial decision of the settlement officer in this proceeding served July 22, 1976. Upon completion of our review we have determined that the decision of the settlement officer should be adopted as the decision of the Commission.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 330 (I)

CUMMINS ENGINE CO., INC.

v.

UNITED STATES LINES, INC.

Adopted March 10, 1976

Reparation granted.

DECISION OF CAREY E. BRADY, SETTLEMENT OFFICER[1]

Cummins Engine Company, Inc. claims $551.08 as reparation from United States Lines, Inc. (USL), for alleged overcharges on three shipments which moved on USL's vessels during March 1973. The first shipment moved on USL's bill of lading No. 631–7301, dated March 23, 1973, from Yokahama, Japan to New York, aboard the American Liberty. The second shipment moved on USL's bill of lading No. 631–7304, dated March 3, 1973, from Yokohama, Japan to New York aboard the American Archer.

The first and second shipments were described on each respective bill of lading as "50 Cases Connecting Rod Assembly". The Bureau of Customs Special Customs Invoice Form 5515 and the shipper's invoice both described the respective cargoes as "50 Cases Connecting Rod Assembly". Bureau of Customs Consumption Entry Form 7501 described the cargoes as "50 Cases Diesel Engine Parts".

Respondent rated the shipments on the basis of $67.25 per 2,000 lbs., which was the applicable rate for "Automobile, Bus and Truck Parts, viz: Other Parts", according to 5320–25 of the respondent's tariff in effect at that time.[2] Total charges on the first shipment were assessed in the amount of $568.06, which included currency surcharges and CFS charge. Total charges were assessed on the second shipment in the amount of $458.39, which included a CY discount of 5%.

The third shipment was described on the bill of lading as "36 Pkgs. 'K engine' component sets". Bureau of Customs Special Customs Invoice

[1] This decision became the decision of the Commission on March 10, 1976.

[2] Japan-Atlantic & Gulf Freight Conference Tariff No. 34, FMC–3, 14th Revised Page No. 234.

Form 5515 described the cargo as "36 Pkgs 'K engine' component sets". The shipper's invoice and packing list described the cargo as "36 Pkgs. 'K engine' component sets" and details the commodities to be: Head Assembly, Gear Cover, Camshafts, Cylinder Block and Crankshaft. Bureau of Customs Consumption Entry Form 7501 described the cargo as "36 Pkgs. Diesel Engine Parts".

Respondent rated the shipment on the same basis as the first two shipments resulting in total charges being assessed in the amount of $1,578.53, including a 5% CY discount.

Complainant contends that the respondent misclassified the shipment and should have applied the rate of $53.50 per 2,000 lbs., the rate for "Automobile, Bus and Truck Parts, viz: Cylinder Block Assemblies, with or without Crankshafts" as per Item 5320–7.[3] Such a classification would have saved the complainant a combined total of $551.08 on all shipments. Complainant argues in support of its position that the Cylinder Block Assemblies description is broad enough and ambiguous enough to cover any type of a part that goes into, or is attached to, a cyclinder block. Further, that description is published without qualification other than with or without crankshafts.

Respondent maintains that in classifying the cargo, it relied on the description on the three bills of lading, namely; Connecting Rod Assembly, and K engine component sets, respectively. Respondent further states that it "is regretted that the shipper did not identify his shipments for what they actually were; namely: 'parts for engine block assembly'. As far as we, here, are concerned, we have no objection to this rate being granted but unfortunately, we feel the final decision, because of the actual description placed on the bills of lading may rest with the Conference Headquarters in Tokyo." The record indicates the Conference does not interpret the cargo shipped to fall in the category of cylinder block assemblies.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove, based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[4] However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[5]

From the documentation of record, it is clear the commodities actually shipped were unquestionably parts for engines, i.e. connecting rod assembly, head assembly, gear cover, camshaft, cylinder block and crankshaft. The Conference tariff discloses no specific commodity rate for connecting rod assembly, head assembly, gear cover or camshaft.

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[3] Ibid.

[4] Western Publishing Company, Incorporated v. Hapag-Lloyd A.G., informal docket No. 283(I) Commission Order served May 4, 1972.

[5] Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115(I) Commission Order served September 30, 1970.

Cylinder blocks and crankshafts are named in the disputed tariff item 5320–7.

Complainant's contention that the commodities shipped are parts of a cylinder block assembly appears to be a reasonable one.

Webster's Third New International Dictionary of the English Language, Unabridged (1964), defines an assembly as:

"5a: the act or process of building up a complete unit (as a motor vehicle), using parts already in themselves finished manufacture products. b: a collection of parts so assembled as to form a complete machine, structure or unit of a machine."

Webster's New World Dictionary, College Edition (1968) defines assembly as:

"4. a fitting together of parts to make a whole, as in making automobiles. . . .
5. the parts to be thus fitted together."

From the above definitions of an assembly, it can reasonably be concluded that cylinder block assemblies include those parts of an engine that go into or are attached to the cylinder block to make up the end product which can be reasonably considered directly related to the construction of an engine. An exploded view of an engine readily shows a connecting rod, gear cover and camshaft go into, or are directly attached to, the cylinder block.

Tariff Item No. 5320–07 is not at all specific as to what component parts constitute a cylinder block assembly, aside from indicating such assembly may be with or without crankshafts. Such a description is so unclear that reasonable men could differ on its application. Where an ambiguity does exist, then the tariff must be construed in such a manner so as to resolve such ambiguity in favor of the shipper.[6]

In addition, the Commission has long recognized that tariff terms should be interpreted reasonably. In National Cable and Metal Co. v. American Hawaii S.S. Co., 2 U.S.M.C. 471 (1941),[7] the Commission's predecessor stated:

"In interpreting a tariff, the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to urge, for their own purposes, a strained and unnatural construction. Tariffs are to be interpreted according to the *reasonable* construction of their language; neither to the intent of the framers, nor the practice of the carrier controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of instruction. *A proper test is whether the article may be reasonably identified by the tariff description*". (underlining supplied)

Since connecting rod assembly, head assembly, gear cover and camshaft are not specifically excluded by Item 5320–7, it can only be concluded that they reasonably fall within the general description of cylinder block assemblies and should have been so rated. A proper case

[6] United Nations Children Fund v. Blue Sea Line, 15 FMC 206, 209 (1972).
[7] Also see Johns Manville Products Corporation, 13 FMC 194, (1970) and Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corp., 8 FMC 137, 140 (1964).

for the recovery of reparation having been made on the three shipments, a refund in the amount of $551.08 is due the complainant; and it is so ordered.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-64

AMERICAN EXPORT LINES, INC., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.—POSSIBLE VIOLATIONS OF SECTION 18(b)(5) OF THE SHIPPING CT, 1916, IN CONNECTION WITH RATES ON MILITARY CARGO

DOCKET NO. 72-65

AMERICAN MAIL LINES, INC., AMERICAN PRESIDENT LINES, LTD. AND SEA-LAND SERVICE, INC.—POSSIBLE VIOLATIONS OF SECTION 18(b)(5) OF THE SHIPPING ACT, 1916 IN CONNECTION WITH RATES ON MILITARY CARGO

DISMISSAL OF PROCEEDINGS

November 17, 1976

The Commission instituted Docket No. 72-65 in December 1972, to determine the lawfulness under section 18(b)(5) of the Shipping Act, 1916 and Commission's General Order 29[1]
of certain rates bid by American Mail Lines, Ltd. (AML), American President Lines, Ltd. (APL), and Sea-Land Service, Inc., for the carriage of containerized military cargo between the West Coast of the United States and Japan pursuant to the Military Sealift Command Request For Proposal (RFP) 700, Second Cycle. The Military Sealift Command and American Export Lines, Inc. (AEL) intervened in the proceeding.

Concurrently with the issuance of an Order of Investigation in Docket No. 72-65, a similar proceeding—Docket No. 72-64—was also instituted to investigate the rates offered by Sea-Land, United States Lines (USL) and AEL in the trade between the East Coast of the United States and the United Kingdom and Europe. APL and AML intervened in that

[1] General Order 29, promulgated on November 28, 1972, sets forth standards for determining the level below which rates quoted for the transportation of U.S. Department of Defense cargoes pursuant to the military sealift procurement system and filed with the Commission pursuant to section 18(b)(1) of the Shipping Act, 1916, would be deemed to be so low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5) of the Act and to establish rules and regulations governing the accounting and allocation procedures which are utilized by the U.S. flag carriers in arriving at military rate quotations.

proceeding. Docket No. 72–64 never advanced to the hearing stage; instead, it was determined to pursue Docket No. 72–65 and hold Docket No. 72–64 in abeyance pending the outcome of Docket No. 72–65.

Of the nine military cargo rates placed under investigation in Docket No. 72–65, only APL's Cargo, N.O.S. rate was ultimately challenged and actively litigated by Commission Hearing Counsel in hearings held in connection with this proceeding. All other rates originally set down for investigation were, for reasons of compliance, admitted noncompliance, or cancellation, not put at issue in the hearings held before the Presiding Officer. At the conclusion of the hearings the Presiding Officer certified the record to the Commission for decision.

The stated purpose for continuing Docket No. 72–65 beyond the life of the challenged rates was to establish prospective guidelines regarding the application of G.O. 29, rather than to make any specific finding of violations. However, in view of the time that has elapsed since the two proceedings were instituted[2] and the imminent introduction of a new standardized cost information system, which, when fully implemented, will necessitate a further revision of G.O. 29, the establishment of guidelines at this time would appear to serve little regulatory purpose. Accordingly, Docket Nos. 72–64 and 72–65 will be discontinued. APL has currently pending a Motion to Dismiss Docket No. 72–65 on the grounds of mootness. In light of our action herein we need not consider the merits of APL's motion.

THEREFORE, IT IS ORDERED, That Docket No. 72–64 and Docket No. 72–65 are hereby discontinued without prejudice to the issues raised therein by any party.

By the Commission.

[SEAL] (s) FRANCIS C. HURNEY,
Secretary.

[2] The Commission determined not to issue a decision in Docket No. 72–65 pending a review by the Court of Appeals of G.O. 29. See *Sea-Land Service, Inc. v. Federal Maritime Commission*, Case No. 73–1204, December 14, 1974. The matter is now before a Commission Administrative Law Judge upon remand from the court.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 360(I)

NATIONAL STARCH &
CHEMICAL CORPORATION

v.

ATLANTIC CONTAINER LINE, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

November 12, 1976

Notice is hereby given that the Commission on November 12, 1976, determined not to review the decision of the settlement officer in this proceeding served November 1, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 360 (I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

ATLANTIC CONTAINER LINE, LTD

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed September 9, 1976, National Starch & Chemical Corporation (complainant) alleges that Atlantic Container Line, Ltd. (carrier) applied an incorrect rate on a container of "liquid synthetic resin" weighing 31,569 pounds, resulting in an overcharge of $92.63. While a violation of Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier denied the claim solely on the basis of Rule 9 of its tariff[2] which prohibits the payment of overcharge claims not presented to the carrier within six months after the date of the shipment.

According to the complainant, the carrier, under bill of lading No. A91402, dated August 22, 1975, transported a container of liquid synthetic resin valued at less than $1,000 per 2,240 pounds, net weight, on a house-to-house basis from New York to Le Havre, France. The carrier assessed a rate of $98.25 per 2,240 pounds on 31,569 pounds in accordance with Item No. 581.0001.220, 1st Revised Page 167 of the Conference tariff. The cargo should have been rated under tariff Item No. 581.0001.650 which provides for a rate of $72.00 subject to a minimum of 40,320 pounds, per container.[3] On the basis of an incorrect application of freight

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301-304(as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review November 12, 1976.)

[2] North Atlantic French Atlantic Freight Conference Tariff No. (3), FMC-4.

[3] Rule 4 of the Conference tariff provides the following:

E. Rates Applicable on Cargo Shipped to Stipulated Minima

1. Where in this tariff two rates are listed for a commodity, that rate noted alongside a qualification specifying a required minimum quantity, either weight or measurement, per Container or in Containers will be applicable to the contents of the Container/s provided the minimum set forth is met or exceeded. At the Shipper's option, a quantity less than the minimum may be freighted at the lower rate *provided the weight or measurement declared for rating purposes is increased to the minimum level.* (underscoring supplied).

charges, the complainant paid $1,446.95 ($1,384.64 plus a 4.5 percent currency surcharge of $62.31). The correct charges should have been $1,354.32 ($1,296.00 plus a 4.5 percent currency surcharge of $58.32). The resultant overcharge is $92.63 ($1,446.95 less $1,354.32).

In response to the served complaint, the carrier stated that it does not dispute the complainant's contention that the rate was incorrectly applied; however, it had no option but to deny the claim in accordance with its lawfully filed tariff.[4]

The Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company* v. *United Fruit Company* reiterated wtat is specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298, 308 (1969) that:

". . .once a claim has finally been denied by a carrier the shipper may still seek and in a proper case recover reparation before the Commission at any time within two years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

The Conference tariff clearly provides that the actual weight of a shipment may be increased to a specified minimum weight for the purpose of providing lower freight charges for the shipper. It is obvious that the higher rate assessed by the carrier in this instance can not apply; and the carrier has so admitted. Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive, a greater compensation than the rates or charges which are specified in its tariff.

The filing of a timely complaint has effectively eliminated the tariff technicality under which the claim originally was denied and inasmuch as a proper case for the recovery of reparation has been made, a refund of $92.63 is due the claimant, and it is so ordered.

(S) WALDO R.PUTNAM,
Settlement Officer.

[4] The shipment was dated August 22, 1975; the claim was filed June 28, 1976 and denied on July 1, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 345(I)

VANDOR IMPORTS

v.

ORIENT OVERSEAS CONTAINER LINES

NOTICE OF DETERMINATION NOT TO REVIEW

November 12, 1976

Notice is hereby given that the Commission on November 12, 1976, determined not to review the decision of the settlement office in this proceeding served November 3, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 345(I)

VANDOR IMPORTS

v.

ORIENT OVERSEAS CONTAINER LINES

Reparation awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

By complaint filed on January 23, 1976, Vandor Imports (complainant) alleges that Orient Overseas Container Lines (OOCL), overcharged it (in violation of Section 18(b)(3) of the Shipping Act, 1916), by failing to pay 14 port equalization claims covering 21 shipments of cargo moving from Hong Kong to complainant located in San Francisco, California. The shipments were unloaded at OOCL's port of delivery at Oakland, California and moved overland truck collect to San Francisco to port of discharge shown on the ocean bills of lading. The claims were filed with the Commission within two years from the date when the cause of action arose (from February 28, 1974 to January 10, 1975). Reparation of $946.59 is being sought.

The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco,[2] (paid by complainant) over the drayage rates within San Francisco. The trucking rates are published in California Public Utility Commission Tariff No. 2 and the drayage rates in California Public Utility Commission Tariff No. 19.

The claims are based on Rule 28 of OOCL's Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1)which provides:

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.
(Note: Notice of Determination not to review November 12, 1976.)

[2] Complainant has submitted freight bills covering the truck movement via D & J Transportation of the subject shipments from Oakland to San Francisco.

"If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier may arrange, at its option, to move the shipment from actual port of discharge as follows:

"To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point designated by the consignee, provided the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading."

Rule 28 was amended slightly effective October 1, 1974, to read as follows:

"If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier (C) shall arrange, at its (C) expense to move the shipment from actual port of discharge as follows: To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point designated by the consignee, provided the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading."

OOCL advised complainant that prior to October 1974, San Francisco, Oakland and Alameda were considered to be one bill of lading port and that the above rule did not apply.

In its partial adoption of the decision in *Konwal Co., Inc.* v. *Orient Overseas Container Line* in Informal Docket No. 327(I), served November 12, 1975, the Commission held:

". . . It is clear therefore that OOCL had discharged its cargo at a discharge port other than that specified in the bill of lading. The carrier, then, had only two lawful options. Both of these options were provided by Rule 28. Under its terms the carrier could:

(1) move the cargo to the port of discharge specified in the bill of lading; or

(2)forward the cargo direct to a point designated by the consignee. . . ."

"From the record, the carrier apparently availed itself of both options with respect to the various shipments. It is our conclusion that having elected to act under Rule 28, the carrier became bound by the provisions thereof. . . ."

OOCL also advised complainant that it has determined from various trucking companies that re-positioning costs are approximately $16.50 per container, which is that amount it agrees to reimburse consignees for full container loads.

This allegation was laid to rest in Konwal, supra, at page 5, footnote 4, of the Settlement Officer's decision:

"Allegedly the policy of OOCL with respect to full container loads being delivered to San Francisco is to give $16.50 allowance per container to the consignee to cover the approximate cost of returning the empty container to OOCL's terminal in Oakland. Reparation of $16.50 is denied as the tariff contains no such allowance and payment of such allowance would violate Section 18(b) of the Shipping Act, 1916. KONWAL has agreed to cancel the $16.50 claim."

This finding was not reviewed by the Commission. The Commission's decision in *Konwal* addressed itself only to the sharing of the payment of truck transportation rates in Rule 28 of OOCL's tariff on file with the Commission at the time of the shipments. "That . . . is all that is at issue here." (Page 4, Partial Adoption of Decision, November 12, 1975) Since

the Settlement Officer's finding stands unreviewed by the Commission and is of precedential value, it is deemed dispositive of the issue also.

Complainant has carefully documented its claim by submitting ocean bills of lading, and local freight bills or memorandum of local bills of lading covering the truck movements from Oakland to San Francisco, indicating local trucking and drayage rates assessed thereon.

The subject claims are listed below.

Claim	*Local Freight Bill Date*	*Equalization*	*Weight*	*Rate and Drayage Costs*	*Transportation Charges*	
V–01	2–28–74 F/B14354	Oakland to S.F.	2 vans	$ 75.00	$150.00	
		S.F. to S.F. Equalization	2 vans	45.00	90.00	
						$60.00
	F/B14261	Oakland to S.F.	832#	$ 1.57	$ 13.06	
			1,800# weight deficit	1.96	35.28	
			2,368#	1.57	37.18	
				s/c	2.50	
				3%	2.57	
					$ 90.59	
		S.F. to S.F.	832#	$ 9.15		
			($1.10)	24.84		
			1,800#	1.02	35.01	
			($1.38)			
			(3%)			
		Equalization				$55.58
V–02	4– 5–74 F/B11906	Oakland to S.F.	1 van	$ 75.00	$ 75.00	
		S.F. to S.F. Equalization	1 van	45.00	35.00	
						$30.00
V–03	4–25–74 F/B10403	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F. Equalization	1 container	45.00	45.00	
						$30.00
V–04	6– 6–74 F/B12563	Oakland to S.F.	1,632#	$ 4.31	$ 70.34	
				3%	2.11	
				s/c	1.50	
					$ 73.95	
		S.F. to S.F.	1,632 as 2,000#	$ 22.00		
			($1.10)			
			(3%)	.66	22.66[3]	
		Equalization				$51.29

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
V–05	6– 6–74 F/B12564	Oakland to S.F.	3 vans	$ 75.00	$225.00	
		S.F. to S.F.	3 vans	45.00	135.00	
		Equalization				$90.00
V–06	8–22–74 F/B15289	Oakland to S.F.	9,257 as 10,000#	$ 1.20	$120.00	
				1%	1.20	
				s/c	3.40	
					$124.60	
		S.F. to S.F.	9,257 as 10,000# ($.82)	$ 82.00		
			(1%)	.82	82.82	
		Equalization				$41.78
V–07	8–23–74 F/B15343	Oakland to S.F.	2 containers	$ 75.00	$150.00	
		S.F. to S.F.	2 containers	45.00	90.00	
		Equalization				$60.00
	F/B15041	Oakland to S.F.	1,960#	$ 4.62	$ 58.21	
				1%	.59	
				s/c	1.50	
					60.31[4]	
		S.F. to S.F.	1,960 as 2,000# ($1.18)	$ 23.60		
			(1%)	.24	$ 23.84	
		Equalization				$36.47
V–08	9–23–74 F/B9751	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F.	1 container	45.00	45.00	
		Equalization				$30.00
	F/B9752	Oakland to S.F.	1,300#	$ 4.62	$ 60.06	
				s/c	1.50	
				1%	.62	
					$ 62.78[5]	
		S.F. to S.F.	1,300 as 2,000# ($1.18)	$ 23.60		
			(1%)	.24	$ 23.84	
		Equalization				$38.94

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
V–09	F/B3239	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F.		45.00	45.00	
		Equalization				$30.00
	F/B2950	Oakland to S.F.	1,000#	$ 4.62	$ 46.20	
				s/c	1.00	
				1%	.47	
					$ 47.47	
		S.F. to S.F.	1,000# ($1.92)	$ 19.20		
			(1%)	.19	$ 19.39	
		Equalization				$28.28
V–10	10–24–74 F/B3819	Oakland to S.F.	3,630 as 5,000#	$ 2.52	$126.00	
				s/c	2.50	
				1%	1.29	
					$129.79	
		S.F. to S.F.	3,630 as 4,000# ($1.38)	$ 55.20		
			(1%)	.55	$ 55.75	
		Equalization				$74.04
	F/B4233	Oakland to S.F.	1 container	$ 75.00	$ 75.00	
		S.F. to S.F.	1 container	45.00	45.00	
		Equalization				$30.00
V–11	10–30–74 F/B3824	Oakland to S.F.	2 vans	$ 75.00	$150.00	
		S.F. to S.F.	2 vans	45.00	90.00	
		Equalization				$60.00
V–12	11–26–74 F/B4060	Oakland to S.F.	1 container	$ 80.00	$ 80.00	
		S.F. to S.F.	1 container	50.00	50.00	
		Equalization				$30.00
V–13	12–11–74 F/B4766	Oakland to S.F.	955#	$ 6.93	$ 66.18	
				s/c	1.00	
				(1%)	.67	
					$ 68.85[6]	
		S.F. to S.F.	955 ($2.88)	$ 27.50		
			(1%)	.28	$ 27.78	
		Equalization				$41.07

Claim	Local Freight Bill Date	Equalization	Weight	Rate and Drayage Costs	Transportation Charges	
	12–12–74 F/B4694	Oakland to S.F.	1 container	$ 80.00	$ 80.00	
		S.F. to S.F.	1 container	50.00	50.00	
		Equalization				$30.00
V–14	1–10–75 F/B11646	Oakland to S.F.	1 van	$ 80.00	$ 80.00	
		S.F. to S.F.	1 van	50.00	50.00	
		Equalization				$30.00
	F/B11483	Oakland to S.F.	1,476#	$ 6.93	$102.29	
				s/c	1.50	
				(1%)	1.04	
					$104.83	
		S.F. to S.F.	1,476 as 2,000 ($1.77)	$ 35.40		
				(1%) .35	$ 35.75	
		Equalization				$69.08
		Total				$946.53[7]

[3] The local drayage computation is $22.66 resulting in a claim for $51.29. Claimant erroneously arrived at a local drayage computation of $22.60, claiming $51.35 due.

[4] Correct freight charges would be 1,960#($4.62) $90.55 + 1% ($.91) + s/c$1.50, or $92.96. However D & J Transportation only assessed charges of $60.31. Claimant states that D &J never submitted a balance due bill for the additional sum of $32.65. As $60.31 is what was actually paid by claimant, the claim will not be changed.

[5] Should be $62.18. However, as the claim is arrived at by using the local transportation charge of $62.78 actually paid by claimant, the 60 cents overcharge paid by claimant for local transportation will not be changed.

[6] Should be $67.85. However, as the claim is arrived at by using the local transportation charge actually paid by claimant, the $68.85 local transportation charge will not be changed.

[7] Exact amount indicated by complainant less the six cent error in Claim V–04 computations as explained in footnote 3.

From the foregoing, OOCL, is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for transportation or any service in connection therewith than the rates and chaages specified in its tariff, and by its failure to remit in any manner any portion of the rates or charges so , and by its failure to remit in any manner any portion of the rates or charges so specified, in accordance with its tariff. Therefore, complainant is awarded reparation of $946.53 with interest at the rate of six percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 347(I)

WILMOT ENGINEERING COMPANY

v.

UNITED STATES LINES, INC.

DISMISSAL OF COMPLAINT

November 18, 1976

Settlement Officer Waldo Putnam served his decision in this proceeding November 8, 1976, wherein he determined that complainant's claim for reparation on an alleged overcharge of ocean freight should be denied.

Our review of this decision discloses that the claim was filed by Traffic Service Bureau, Inc. as agents for complainant. The Commission's Rules of Practice provide that practice before the Commission is limited to attorneys, persons admitted to practice, or officers or regular employees of a party to a proceeding (46 CFR 502.26 and 502.27). Practice before the Commission by firms or corporations on behalf of others is specifically prohibited (46 CFR 502.28).

There is nothing in the Commission's files to indicate that the person filing this claim is an attorney, or admitted to practice before the agency. Neither does it appear that he is an officer or regular employee of complainant. Rather, the claim was submitted by one firm on behalf of another. In view of these circumstances, it is concluded that the complaint was not properly submitted under the Rules of Practice and cannot be considered on its merits.

Accordingly, it is ordered that the complaint in this proceeding is dismissed without prejudice to resubmission within the two-year statutory time period for filing of such claims.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 342(I)

CELESTIAL MERCANTILE CORPORATION

v.

M. GOLODETZ & CO., INC.
AS AGENTS FOR TELFAIR SHIPPING CORP.

NOTICE OF ADOPTION

November 24, 1976

The Commission by notice served August 6, 1976, determined to review the decision of the Settlement Officer in this proceeding served July 22, 1976. Upon completion of review it has been determined that the decision of the Settlement Officer should be adopted as the decision of the Commission.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 342(I)

CELESTIAL MERCANTILE CORPORATION

v.

M. GOLODETZ & CO., INC.
AS AGENTS FOR TELFAIR SHIPPING CORP.

Adopted November 24, 1976

Reparation Denied.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $1,466.27 from respondent,[2] claiming a freight overcharge on a shipment from Philadelphia, Pennsylvania to Dubai, United Arab Emirates, carried aboard the "Nego May" on bill of lading dated September 29, 1975, pursuant to the terms of Triton International Carriers, Ltd.—United Kingdom/Continental Europe/Mediterranean/Red Sea/East Africa and Persian Gulf Tariff FMC No. 2.

The shipment consisted of 900 cartons of motor oil weighing 54,000 pounds and measuring 1170 cubic feet. The shipment was rated by the respondent on the basis of $129.25 per cubic feet, the applicable rate for "Oil, Lube". Total charges were assessed in the amount of $3,780.56.

Complainant maintains the proper rate is $96.00 per 2240 pounds but does not indicate the tariff authority.

Both parties agree that the claimant booked a shipment of 900 cartons of motor oil and was originally quoted a rate of $96.00 per 2240 pounds by Triton's agent, F. M. Clifford Agencies and was billed at that quoted rate. When the bill of lading was to be picked up from the Timechartered Owners' agent, M. Golodetz & Co., Inc., complainant was advised Triton's agent quotation was erroneous and the appropriate rate was $129.25 per measurement ton. Complainant paid the new quoted rate under protest.

[1] This decision was adopted as the decision of the Commission November 24, 1976.

[2] The original charterer, Triton International Carriers, Ltd., through default in payments of hire breached the terms of the charter agreement. The Timechartered Owners, Telfair Shipping Corporation and their agents, M. Golodetz & Co., Inc., continued to prosecute the voyage in consideration of the freight monies being collected by M. Golodetz & Co., Inc. and applied in satisfaction of Telfair Shipping Corporation's lien against the cargo and freight monies.

A review of Triton's tariff discloses the two rates in question are both rated under "Oil, Lube" found on Page 20, second revision, effective September 24, 1975. The commodity rate is in two parts. The first quotes the rate of $129.25 W/M from Searsport, Me./Brownsville, Texas Range to Ports of Call in the Mediterranean/Red Sea/East Africa/Persian Gulf. The second rate quoted is a temporary rate of $96.00 W from Philadelphia to Aqaba-Jeddah-Abu Dubai and Doha, effective September 24, 1975 through October 27, 1975. The specific temporary rate does not identify Dubai as a port eligible for the reduced rate, hence the shipment must be rated under the general commodity rate of $129.25 W/M. Therefore, the reparation is denied.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-44

KRAFT FOODS

v.

MOORE MCCORMACK LINES, INC.

Carrier tariff rule requiring claim for adjustment of freight charges to be filed with the carrier before shipment leaves custody of the carrier cannot be used to defeat a claim filed with the Commission within the two-year statute of limitation period.

Where shipment has left custody of the carrier before a claim for adjustment in measurement is filed, a heavy burden of proof is imposed.

Reparation awarded.

John J. Lavaggi, William Levenstein for complainant. J. D. Stratton for respondent.

REPORT ON REMAND

November 24, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners.*)*

PROCEEDINGS

This proceeding involves a claim by Kraft Foods for reparation from Moore McCormack Lines, Inc. for alleged overcharge of ocean freight. The proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit; *Kraft Foods v. Federal Maritime Commission,* decided July 13, 1976. We previously denied the claim by decision served March 26, 1974, and denied a petition for reconsideration by order served December 13, 1974. Our denial was based solely on the fact that respondent's applicable tariff contained a provision (Rule 16) which would not permit it to make adjustments in freight charges based on alleged error in weight or measurement if the shipment involved had left the custody of the carrier. So far as pertinent Rule 16 provides as follows:

*Commissioner Bob Casey not participating.

16. OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier.

We had determined that the tariff rule was not shown to be unlawful and inasmuch as section 18(b)(3) of the Shipping Act, 1916, required strict adherence to lawful tariff rules the claim must be denied since it was brought well after the shipment had left the custody of the carrier.

The Court of Appeals on review has determined that Rule 16 is not a valid tariff provision, insofar as it conflicts with section 22 of the Shipping Act, 1916. Section 22 provides for filing of complaints before the Commission and permits such filing within two years of an alleged violation of the Shipping Act. The Court found that while Rule 16 does not prevent the filing of a claim for reparation based on weights or measurements it does require that such a claim be rejected unless presented to the carrier before the shipment leaves its custody. The right to file a claim becomes illusory once the carrier has delivered the shipment. In effect therefore the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was viewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. The case was remanded to the Commission for further proceedings on the merits of the claim.

FACTS

This proceeding was conducted under the Commission's shortened procedure by agreement of the parties. The evidence of record is limited to those materials included with the complaint and subsequently submitted on exception.

The shipment from which the complaint arose was transported on the *S. S. Mormacbay* of Moore McCormack which sailed from New York on December 31, 1972, arrived in Mombasa on February 3, 1973, and left Mombasa on February 10, 1973. Between February 3 and February 10, 1973, the disputed cargo was unloaded and accepted by the consignee/customer of Kraft Foods.

The transportation charges levied in this case were based upon a measurement of 284 cubic feet, shown on the bill of lading and on the reverse side of the dock receipt. As a result of these charges, the consignee notified Kraft Foods by letter of February 12, 1973, that it seemed that the freight had been overcharged. Thereafter, on February 23, 1973, complainant Kraft Foods notified Moore McCormack of the suspected overcharge and Kraft Foods' challenge to the measurements on which the charges were based. Complainant contended that the accurate measurement of the shipment was 146 cubic feet as shown on various documents including the face of the dock receipt. Respondent countered by asserting that the 146 cubic foot measurement was not that observed

upon delivery of the cargo to the loading pier but that the 284 cubic foot measure shown on the bill of lading and the reverse side of the dock receipt was the measure observed upon delivery.

In support of its claim complainant has submitted the following:

1. A copy of its sales invoice No. 01186 indicates that a shipment was to be delivered to Moore McCormack on December 28, 1972, to be shipped on the *S. S. Mormacbay* to Nairobi Supermarket via Mombasa. The invoice indicates that the shipment was to consist of:

15 cases (5862) 12/6 1/4 oz. Noodles Romanoff
25 cases (5873) 16/1 lb. 3-2/3 oz. Spag. W/MT Sce
15 cases (6073) 24/10 1/2 oz. Min Col Flav Marsh
20 cases (6080) 6/1 lb. Min Marshmallow—W.
40 cases (6100) 24/10 oz. Jet Puff Marshmallow

2. A copy of Moore McCormack Lines bill of lading No. 126 dated December 29, 1972, covering a shipment on the *S. S. Mormacbay* by complainant to Nairobi Supermarket via Mombasa. The bill of lading indicates that the shipment consisted of 40 cases of Noodle Dinner/ Spaghetti Dinner measuring 67 cu. ft. and 75 cases of Marshmallows measuring 217 cu. ft., for a total of 284 cu. ft.

3. A copy of Moore McCormack Lines dock receipt which indicates it covers complainant's invoice No. 01186 and BL 126, delivery date December 28, 1972. The front of the dock receipt describes the shipment the same as the bill of lading except the measurement for the Noodle/ Spaghetti Dinner is stated as 32 cu. ft. and for the Marshmallows is stated as 114 cu. ft., with a total of 146 cu. ft. The back of the dock receipt contains handwritten notations listing the measurements of undescribed lots of 30, 10, 20, 30 and 25 packages. The total measurement is stated as 283.50 cu. ft.

4.Copies of complainant's price list pages which indicate the standard measurement of complainant's products identified by Product Nos. which coincide to those listed in complainant's Invoice No. 01186.

5. A reconstructed packing list dated March 9, 1973 which totals the cubic measurement for the number and type of products listed in the shippers invoice, using the standard cube listed in the shippers price list. The total cubic measurement computes to 145.01 cu. ft.

DISCUSSION

The lesson of the Court of Appeals opinion in *Kraft* is clear. Tariff provisions of the type involved here (Rule 16) cannot be used before the Commission to defeat a claim for reparation which was otherwise properly filed within the two year statute of limitation period. Notwithstanding the existence of such a tariff provision, properly filed claims must be considered on their merits.

In considering such claims, determination of the applicable rate shall be based on what can be shown is the true nature of the commodity shipped.

Such a determination will be based on all the evidence of record with no single document or piece of evidence necessarily being controlling. As we said in Informal Docket 283(I) *Western Publishing Company, Inc. v. Hapag Lloyd A.G.*, order served May 4, 1972.

"the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. Likewise, claimant is not bound as least where the misdescription results from shipper's unintentional mistake or inadvertence. But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim".

As indicated above, in considering claims involving disputes as to the nature of cargo (either weight, measurement or description), if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on complainant. Nothing in the Court's opinion in *Kraft* should change this.

In the instant case complainant seeks an adjustment in the measurement of the cargo and the cargo was not reexamined before the claim was brought. Accordingly, the heavy burden of proof requirement applies. We think it has been met.

Complainant has provided rather detailed information which indicates the type, quantity, and size of the components of the shipment in question. The sales invoice, the bill of lading and the dock receipt all indicate that the shipment consisted of 40 cases of Noodle Dinner/ Spaghetti Dinner and 75 cases of Marshmallows. The sales invoice further breaks down the shipment into lots of 15 Noodles Romanoff and 25 Spaghetti with meat sauce to comprise the 40 cases of noodles/spaghetti and lots of 15 miniature colored flavored marshmallows, 20 miniature marshmallows and 40 jet puff marshmallows to comprise the 70 cases of marshmallows. Each of these lots is identified by a four digit number. The identification numbers coincide with the numbers contained in complainant's price list which indicates the standard measurements of complainant's products. From all of this information it is demonstrated that a shipment consisting of the number of cases and types of products listed, when checked against complainant's sales brochure, would have a standard cubic measurement of 146 cu. ft., the measurement for which complainant argues the shipment should have been rated.* As indicated above this measurement is also the amount shown on the front of the dock receipt.

The evidence to the contrary consists of the handwritten entries in the bill of lading and computations on the back of the dock receipt which

*The actual figure on which complainant bases its claim is 153 cu. ft. This figure is calculated employing respondent's applicable tariff rule which governs rounding off of fractions in computing cubic measurements.

would indicate the shipment measured 284 cu. ft. These figures are said by respondent to represent the actual measurements taken at the pier.

Generally it is difficult to overcome evidence regarding measurement of cargo which measurement is actually recorded by measuring at the pier. However, the measurements on the back of the dock receipt in this case have absolutely no relation to what are shown to be the standard measurements of the cargo shipped. Additionally, the number of packages of various sizes recorded on the back of the dock receipt and said to represent this shipment bear no relation to the number of packages of various sizes which are otherwise shown by complainant's evidence to comprise this shipment. We can only conclude that the preponderance of evidence is such that the measurements said to be recorded at the pier at the time of shipment cannot be the measurements for the shipment in question. Such a variance in quantities and measurement might have been occasioned by mistake in matching shipment with dock receipt or by some other similar mistake. We need not speculate further as to the reason or explanation for the recording of such measurements.

We conclude therefore that complainant has satisfied its burden of proof in this proceeding and is entitled to reparation in the amount of $364.46. It is so ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-30

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL LINES, INC.

NOTICE OF ADOPTION

September 23, 1976

The Commission by notice served October 28, 1976, determined to review the initial decision of the Administrative Law Judge in this proceeding served September 23, 1976. Upon review, the Commission has determined to adopt the ultimate conclusions of the initial decision to the effect that Commission precedent provides a legitimate basis for awarding reparation in this proceeding and that it be awarded.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76-30

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL LINES, INC.

Adopted September 23, 1976

Shipment described by shipper as "Cyanogas A Dust, Calcium Cyanide 42%, ICC Class B Poison" should have been charged rate under "Insecticides, NOS, class 10" rather than at higher tariff rate for "Chemicals NOS." Reparation awarded.

William Levenstein for Pan American Health Organization, complainant.

John J. Purcell of Lilly, Sullivan & Purcell for Prudential Lines, Inc., respondent.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

INTRODUCTION

By complaint filed May 24, 1976, the complainant alleges that an inapplicable rate was charged on a shipment of 640 drums of a dry chemical used as a pesticide, from the port of New York to Guayaquil, Ecuador. The bill of lading was dated June 27, 1975. The shortened procedure was followed.

Freight charges of $6,341.39 were paid, based on the rate of $148.25 per 40 cubic feet (W/M) for "Chemicals, N.O.S., non-hazardous, actual value over $700 per freight ton." (Atlantic & Gulf/West Coast of So. Amer., Freight Tariff F.M.C. No. 1, page 47, 8th rev., effec. Dec. 1, 1975.) The complainant asserts that the 640 drums of "Cyanogas A Dust, Calcium Cyanide 42%, ICC Class B Poison," as described in the bill of lading, should have been charged $4,320.28, based on the rate of $101 per 40 cubic feet (W/M) for "Insecticides, N.O.S., dry, liquid or paste, actual value over $600 per freight ton." (Atlantic & Gulf/West Coast of So. Amer., Freight Tariff F.M.C. No. 1, page 179, 5th rev., effec. June 2,

[1] This decision became the decision of the Commission September 23, 1976.

1975; page 168, 10th rev., effec. April 7, 1975; and page 137, 9th rev., effec. September 16, 1974.) The parties do not dispute the propriety of the additional charges for port congestion and bunker surcharge.

DISCUSSION AND CONCLUSIONS

The shipper has established, by documentary evidence[2] attached to the pleadings, that the subject commodity shipped was, in fact, a pesticide, which, by commodity index listing under the appropriate and then-effective tariff, should properly have been rated under the commodity description for "Insecticides, N.O.S., class 10."

It is undisputed that neither term "pesticide" nor "insecticide" appeared on the bill of lading.[3] The complainant points out (Reply Memorandum) that "the bill of lading is their document (the carrier's), not the shipper's," citing the Harter Act, thus placing the responsibility for the incorrectness of the bill of lading description on the carrier. This argument ignores the fact that it is the shipper who provides the description on the bill of lading, and not the carrier, in the section of the form specifically designated as follows: "PARTICULARS FURNISHED BY SHIPPER—Shipper's Description Of Packages And Goods." This fact of life is not changed by the legal event that transforms the *completed* document into a document "issued by" the carrier.

Where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant's (new) description, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 SRR 979, 981 (1970). It is usually the case, as it is here, that the carrier, in classifying and rating a shipment, must look to the information supplied him by the shipper or freight forwarder. Elementary fairness would seem to dictate that the carrier should be entitled to rely on such information, and to charge and collect freight in accordance with the description supplied by the shipper. To require the respondent or any other carrier to inquire of a shipper as to whether the supplied description of cargo is correct would place an undue burden on the carrier. We cannot expect the carrier to be a "mind-reader" (n.b., sealed drums) or a chemical analyst. Thus, we cannot quarrel with the appropriateness of the carrier's initial reliance on Item (r) on page 10 of the filed tariff.[4]

The importance of declaring in bills of lading the correct description of

[2] Extracts from Condensed Chemical Dictionary, manufacturers' brochures and bill of lading.

[3] The record also discloses that none of the documentation which the shipper *now* produces to show that Cyanogas A Dust is, in fact, a pesticide and/or insecticide was ever presented to the carrier at or before the subject shipment.

[4] "(r): Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name, to conform to merchandise descriptions appearing herein. Bill of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum."

the cargo shipped cannot be overemphasized. The carrier has the right to expect that a shipper will properly identify his shipment, just as the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried. (*Cf.* recent Initial Decision in *Commercial Solvents Corp. v. Moore-McCormack Lines,* Docket No. 75–50, served September 16, 1976.) The now-prevalent practice of some shippers to provide trade name descriptions for their cargoes, or vague descriptions that do not comport with anything listed on filed tariff commodity index lists, and then a year or more later, to play the "rating game" by newly arguing (with documentation never before presented to the carrier) that some other tariff rate (lower, of course) should have been used, should be discouraged. The fact that there are firms that offer to "audit" shippers' records in the hopes of finding just such potential conflicts, with regard to long-completed shipments, does not make the practice any more palatable.[5] A more equitable rule would seem to limit reparations to those cases where the actual language used on the face of the bill of lading indicates an improper misclassification or obvious disregard, by the carrier, of the descriptive language used by the shipper. Furthermore, a shipper who insists upon using a trade name, rather than an appropriate and readily-available commodity index description in the filed tariff, should be held to do so at his peril—especially in view of the duly filed "trade name" *caveat* expressed in Item (r), page 10, of the instant tariff. (*Supra,* fn. 4.)

Having said this, however, we must return to what the law is under present Commission policy and case interpretation, and this requires a finding for the complainant. (See *Ludwig Mueller Co. v. Peralta Shipping Corp.,* 8 F.M.C. 361 (1965); *Ocean Freight Consultants, Inc. v. Bank Line, Ltd.,* 9 F.M.C. 211 (1966); *Corn Products Co. v. Hamburg-Amerika Lines,* 10 F.M.C. 388 (1967).) On the unavailability of Item (r), page 10 of the tariff, as a defense to claims such as these, see *Abbott Laboratories v. Prudential-Grace Lines,* 17 F.M.C. 186 (1973).

Past Commission policy and precedent have unquestionably declared shipper's misdescriptions of cargo to be legitimate bases to award relief, even without fault on the part of the carrier. In cases involving alleged overcharges under section 18(b)(3) of the Act, the Commission has determined that the controlling test is what the complainant (shipper) can prove was actually shipped. *Union Carbide Inter-America v. Venezuelan Line,* 17 F.M.C. 181, 182 (1973); *Abbot Laboratories v. Moore-McCormack Lines, Inc.,* 17 F.M.C. 191, 192 (1973); *Western Publishing Co. v. Hapag Lloyd A.G.,* 13 SRR 16, 17 (1973).

Accordingly, I must conclude, and so find, that the complainant is entitled to the reparation requested, albeit in the slightly smaller amount

[5] *Cf.,* dissenting remarks of Commissioner Hearn in *Ocean Freight Consultants, Inc. v. Bank Line, Ltd.,* 9 F.M.C. 211, 216–218 (1966).

of $2,021.11 (the port congestion charge was mis-stated by 3 cents on page 2 of the complaint).

IT IS SO ORDERED.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
September 23, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 355(I)

SCM CORPORATION

v.

SEATRAIN INTERNATIONAL, S.A.
&
SEATRAIN U.K. LTD.

NOTICE OF ADOPTION

December 3, 1976

The Commission by notice served August 12, 1976, determined to review the decision of the Settlement Officer in this proceeding served July 30, 1976. Upon completion of review it has been determined that the decision of the Settlement Officer should be adopted as the decision of the Commission.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

IFORMAL DOCKET NO. 355(I)

SCM CORPORATION

v.

SEATRAIN INTERNATIONAL, S.A.
&
SEATRAIN U.K. LTD.

Adopted December 3, 1976

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed with the Commission under date of May 28, 1976, SCM Corporation (complainant) alleges that Seatrain International, S.A. and Seatrain, U.K. Ltd., (carrier) assessed incorrect emergency bunker surcharges resulting in a collective overcharge of $328.84 on three shipments transported during June and July 1974. The claims originally were denied solely on the basis of the carriers so-called six-month rule[2] which limits the filing of overcharge claims to a period of within six months from the date of shipment.

The carrier's response to the served complaint merely consisted of a copy of a notice to the complainant advising that the claim had been reviewed and payment would be forthcoming.[3] The notice also contained a request to the Settlement Officer to discontinue this docket based upon payment of the claim.[4]

Unfortunately, discontinuance of this proceeding without first determining the merits of the claims is not possible without also finding the carrier in violation of its governing tariff and, as a consequence, the Commission's statutes. Accordingly, in order to prevent the carrier from being

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] North Atlantic Westbound Freight Associations' Tariff No. 33, Rule 12.

[3] See Footnote 1—General Order 16, Amendment 12 (section 502.304(e)) provides in pertinent part that failure of the carrier to ". . . . . indicate refusal or consent *in its response* will be conclusively deemed to indicate such consent."

[4] By letter dated July 20, 1976, claimant advised that the claim has been paid in full.

charged with a violation of section 18(b)(3) of the Shipping Act, 1916, as amended,[5] I find that the complainant has made a case for the recovery of the excess bunker surcharge and I hereby authorize and order reparation in the amount of $328.84.

However, the carrier, in this instance, was perfectly within its rights to deny the subject claim; and, in fact, it was *required* to do so under the terms of its tariff. The unauthorized payment of an otherwise legitimate claim in response to the application of stimuli while denying all other similar claims absent such stimuli, represents precisely the type of discriminatory practices proscribed by section 16 First of the Shipping Act, 1916. I am not here attempting to determine the justness of reasonableness of the carrier's past claims handling practices; nor am I, at this time, alleging any impropriety on the part of the carrier in its handling of such claims. I do, however, feel duty-bound to remind the carrier that future tariff violations could carry with them the attendant penalties imposed as a result of concurrent violations of the shipping statutes administered by this Commission.

(S) WALDO R. PUTNAM,
Settlement Officer.

[5] Section 18(b)(3) of the Shipping Act, 1916, as amended forbids a carrier to retain freight charges in excess of those authorized under its effective tariff. That section also makes it unlawful for a carrier to extend or deny to any person, any privilege or facility except in accordance with its tariffs.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-37

AMERICAN CRUISE LINES, INC.—PETITION FOR DECLARATORY ORDER

DENIAL OF PETITION

December 14, 1976

This proceeding was initiated as a result of a Petition for Declaratory Order filed by American Cruise Lines, Inc. (ACL or Petitioner). Specifically, ACL requests that the Commission declare that the requirements of section 3, Public Law 89-777 (46 U.S.C.A. 817e) do not apply to its operations.[1]

Notice of ACL's Petition was published in the *Federal Register* and Commission Hearing Counsel submitted a response opposing the ACL petition. The American Society of Travel Agents indicated their opposition to the ACL Petition and requested additional time to submit a brief, but they failed to do so.

ACL, a Delaware Corporation, is engaged in the transportation of passengers for hire between various points on the Atlantic Coast of the United States, under operating authority granted by the Interstate Commerce Commission (ICC), to wit: Certificate of Public Convenience and Necessity No. W-1283. ACL presently provides service utilizing two vessels, the *M/V American Eagle* and the *M/V Independence,* both of which have berth or stateroom accommodations for 50 or more passengers. Although ACL has complied with the provisions of sections 2 and 3 of P.L. 89-777 and the Commission's Regulations, 46 C.F.R. 540 *et seq.*, it has done so under protest with respect to section 3.[2]

ACL takes the position that its status as an ICC certificated carrier

[1] Section 3 of P.L. 89-777 provides, in pertinent part, that:

No person in the United States shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for 50 or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or in lieu thereof a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.

[2] ACL does not protest the applicability of section 2 of P.L. 89-777 to its operations. Section 2 provides:

Each owner or charterer of an American or foreign vessel having berth or stateroom accommodations for 50 or more passengers, and embarking passengers at United States ports, shall establish, under regulations prescribed by the Federal Maritime Commission his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from United States ports, in an amount based upon the number of passenger accommodations aboard the vessel.

precludes the application of section 3 of P.L. 89–777 to its operations. It is Petitioner's opinion that its status as an ICC certificated carrier subjects it only to ICC jurisdiction, which Commission has not seen fit to promulgate insurance requirements for water carriers although it has imposed such requirements for carriers by other modes of transportation. Furthermore, ACL argues that, as an ICC carrier, section 33 of the Shipping Act, 1916 (46 U.S.C.A 832) precludes the applicability of section 3 of P.L. 89–777 to its operations. That section provides that the Shipping Act:

> . . . shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confirm upon the [Federal Maritime] board concurrent power or jurisdiction over any *matter* within the power or jurisdiction of such commission; nor shall this Act be construed to apply to intrastate commerce. (Emphasis added)

While ACL acknowledges that P.L. 89–777 was not enacted as part of the Shipping Act, 1916, it nevertheless argues that section 33 of the 1916 Act precludes the application of section 3 of P.L. 89–777 to its operations. ACL takes the position that this Commission's jurisdiction with respect to section 3 is limited by the spirit if not the strict provisions of section 33 of the Shipping Act, 1916.

ACL also argues that because section 3 prohibits a carrier from providing transportation without the required showing of financial responsibility, it is inconsistent with the provisions of 49 U.S.C.A. 905(a), which imposes a duty upon an ICC water carrier to provide transportation. Additionally, ACL argues that passengers who suffer damages for nonperformance are adequately protected by the provisions of 49 U.S.C.A. 908. That section provides for reparation in the event of any illegal act including the failure to do anything required by the Interstate Commerce Act, but it does not require insurance or bond in the event of insolvency.

Hearing Counsel's opinion is that the plain meaning of the language contained in P.L. 89–777 and its legislative history make it evident that Congress intended to include ICC certificated carriers within the provisions of that law and this Commission's jurisdiction.

Hearing Counsel further argue that the provisions of section 33 of the Shipping Act, 1916 do not preclude the application of P.L. 89–777 requirements to ACL. They reason that since P.L. 89–777 was not enacted as part of the Shipping Act, 1916, section 33 of that Act does not apply. Furthermore, it is pointed out that even if P.L. 89–777 were part of the Shipping Act, it would not bar this Commission from regulating ACL since section 33 precludes the exercise of *concurrent* jurisdiction only as to *matter* and not as to persons. Hearing Counsel argue that inasmuch as Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, *et seq.*, which applies solely to water carriers, contains no provision similar to those of section 3 of P.L. 89–777 (or for that matter section 2) there is no conflicting subject matter jurisdiction between the two sister agencies. In this regard, we are reminded that businesses are frequently subject to

regulation by several agencies. We agree with the position advocated by Hearing Counsel and are accordingly denying ACL's petition.

The language of P.L. 89–777 is clear and unambiguous, and leaves no doubt that its provisions apply to *all* vessels which embark passengers at U.S. ports and which have stateroom accommodations for 50 or more persons even if the operations of that vessel otherwise fall within the jurisdiction of the Interstate Commerce Commission. While the legislative history of P.L. 89–777 does not reveal any congressional concern with "jurisdictional overlapping" it does reveal Congress' intent to protect passengers from default by *any passenger vessel* and to avoid evasions of law. U.S. Cong. and Admin. News, 4182 (1966). As originally introduced H.R. 10327, which became P.L. 89–777 applied to "operators of ocean cruises." The House bill defined ocean cruises as "an ocean voyage for hire of passengers, other than common carrier service. . . ." The Se ate rejected the House provision and substituted the present language of P.L. 89–777. In conference, the managers of the House bill in accepting the Senate amendment noted that the House version excluded common carrier service from the provisions of the bill. Therefore, while Congress did not specifically address the matter of "jurisdictional overlapping," the legislative history of P.L. 89–777 evidences a congressional intent to include *all* carriers within its scope, without regard to whether they may be otherwise regulated.

Nor does section 33 of the Shipping Act, 1916 preclude this Commission's exercise of jurisdiction over ACL pursuant to P.L. 89–777. Not only was P.L. 89–777 not enacted as part of the Shipping Act, 1916, but as Hearing Counsel have correctly stated, section 33 only precludes concurrent subject matter jurisdiction. While ACL, as an interstate common carrier by water is subject to Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, *et seq.*, none of its provisions are even similar to the provisions of section 3 of P.L. 89–777 (46 U.S.C.A. 817e).

In *Alabama Great Southern Railroad Company v. Federal Maritime Commission,* 379 F.2d 100 (1967)[3] the United States Court of Appeals for the District of Columbia in resolving a similar issue held:

> Where a person performs functions some of which are subject to regulation under the Shipping Act and others under the Interstate Commerce Act the same person might be subject to the jurisdiction of one or the other Commissions depending on the subject matter to be regulated.

As noted earlier, Part III of the Interstate Commerce Act, to which ACL is subject, does not contain a provision requiring parties subject to that Part to establish financial responsibility for passenger indemnification as required by P.L. 89–777. Accordingly, this Commission in exercising jurisdiction over ACL under that Public Law is in no way exercising concurrent jurisdiction with the ICC. Not only does the Interstate

[3] That businesses are often regulated by several government agencies is further supported by *Greater Baton Rouge Port Commission v. The United States,* 287 F.2d 86 (5th Cir. 1961).

Commerce Act not prohibit carriers subject to it from complying with the rules and regulations of other agencies, but it specifically provides in Part III thereof that:

> Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or for laws respecting seamen, or any other law, regulation, or custom, not in conflict with the provisions of this chapter. (49 U.S.C.A. 920d).

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order made subject of this proceeding is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-50

COMMERCIAL SOLVENTS CORPORATION INTERNATIONAL, INC.

v.

MOORE-MCCORMACK LINES, INC.

Complaint dismissed as untimely filed.

William Levenstein for Commercial Solvents Corporation International Inc., Complainant.

J.D. Straton, Jr. for Moore-McCormack Lines, Inc., Respondent.

REPORT

January 4, 1977

(*Karl E. Bakke*, Chairman; *Ashton C. Barrett*, *Bob Casey*, and *James V. Day*, Commissioners)

BY THE COMMISSION: This proceeding is before the Commission on exceptions from Complainant Commercial Solvents Corporation International, Inc. (CSC) to the Initial Decision of Administrative Law Judge Thomas W. Reilly in which he found that Respondent Moore-McCormack Lines, Inc. collected freight charges in excess of those provided in its tariff on five shipments described in the bills of lading as "Chemicals, NOI[1] (2-Amino—2 Methyl—1 Propanol)," carried by Respondent from New York to Buenos Aires, Argentina. The Presiding Officer issued an Initial Decision awarding reparation in the amount of $165.00, to which CSC excepts. No reply to CSC's exceptions was received.

Before considering the merits of the case the Commission must ascertain that it has the authority to grant the relief requested.

Section 22 of the Act reads in part:

The board,[2] if the complaint is filed within two years after the cause of action accrued,[3] may direct the payment . . . of full reparation to the complainant. . . .

[1] Not Otherwise Identified.

[2] Federal Maritime Board, predecessor to the Federal Maritime Commission.

[3] A cause of action arises under section 18(b)(3) of the Act either upon delivery of the cargo to the carrier or upon payment of the freight charges whichever is later. *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971).

The complaint was filed on November 12, 1975. Freight on the five shipments was prepaid. The date the cargo was delivered to the carrier, as per each bill of lading, is as follows: bill of lading No. 100—November 9, 1973; bills of lading nos. 123, 125, 126 and 128—November 12, 1973.

Starting the count with November 9 and 12, 1973, the last days for filing the complaint were November 8, 1975 with respect to the claim arising under bill of lading no. 100, and November 11, 1975 for the claims arising under bills of lading nos. 123, 125, 126 and 128.

In *CSC International, Inc. v. Waterman Steamship Corp.*, Docket No. 75–31, Order on Remand served October 8, 1976, the Commission waived pursuant to Rule 1(j)[4] the exception in Rule 7(a)[5] so as to make the method of computing time provided therein applicable to the two-year period of section 22. There, the last two days of the period of limitation fell on Saturday and Sunday when the Commission's offices were closed. The Commission determined that under those circumstances rejecting the filing of the complaint on the following Monday as untimely would cause undue hardship which warranted the issuance of a waiver.

However, the undue hardship which must be shown to support a waiver under Rule 1(j), and which was found to exist in *CSC International,* has not been established here. November 11, 1975, fell on a Tuesday, that is, on a day when the Commission's offices were open for business, and while November 8, 1975, fell on a Saturday, applying the rationale of *CSC International* to the claim arising under bill of lading no. 100, the last day for filing would have been Monday, November 10, 1975, and not November 12. Accordingly, we find that the complaint was filed after the expiration of the two-year statutory period provided in section 22 of the Act and must therefore be dismissed.

The disposition of this case renders unnecessary a discussion of the exceptions raised by CSC.

The complaint is dismissed.

Vice Chairman Clarence Morse, concurring and dissenting.

I concur in the result but not for the reasons stated in the majority's report. See my dissent in *CSC International v. Waterman Steamship Corp.*, supra.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[4] Rule 1(j) reads in part:

Except to the extent that such waiver would be inconsistent with any statute, any of the rules in this part,. . . may be waived by the Commission or the presiding officer . . . to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. (46 C.F.R. 502.10).

[5] Rule 7(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.101) provides in part:

In computing any period of time under the rules in this part *except § 502.63 (Rule 5(c))*, the time begins with the day following the act, event, or default, and includes the last day of the period. . . (Emphasis added.)

Section 502.63 (Rule 5(c)) refers to the filing of complaints seeking reparation filed under section 22 of the Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-27

ABBOTT LABORATORIES

v.

VENEZUELAN LINE

Carrier tariff rule requiring rating as N.O.S. when bill of lading description is by trade name is not applicable where trade name did not appear on bill of lading. Same tariff rule cannot in any event be used to preclude consideration by the Commission of nature of cargo when timely complaint is filed.

Section 18(b)(3) of the Shipping Act, 1916 states it is unlawful for a carrier to assess charges greater, less or different from those specified in its tariff. Unlawfulness does not depend on whether improper assessment was knowing or inadvertent.

Reparation awarded.

William Levenstein for complainant.

G. E. McNamara for respondent.

REPORT

January 5, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, James V. Day and Bob Casey, *Commissioners*).

PROCEEDINGS

This proceeding was instituted by a complaint filed by Abbott Laboratories against Venezuelan Line. Complainant alleges that respondent has subjected it to an ocean freight rate which is unjust, unreasonable and in violation of section 18(b)(3) of the Shipping Act, 1916. Administrative Law Judge William Beasley Harris called for a hearing in the matter which was attended only by counsel for the complainant. Respondent's only appearance in the proceeding was in the form of two letters to the Administrative Law Judge.

Initial decision was served November 11, 1975, wherein the Administrative Law Judge determined that the claim for reparations should be denied. The matter is before us on exceptions to the initial decision.

FACTS

Complainant is a corporation incorporated in the State of Illinois and its principal business is marketing of chemicals, drugs, medicines, pharmaceuticals and products similar and related thereto. Respondent is a common carrier by water engaged in transportation of cargo between U. S. Atlantic and Gulf Ports and Ports in Venezuela and Netherland Antilles and as such is subject to the provisions of the Shipping Act.

The complaint seeks recovery of overcharges on six shipments from Baltimore to La Guaira, which were transported during the period of August through December 1973. The cargo in question was described on the bill of lading as "Raw Drugs." Respondent applied the rate applicable to "Drugs, Harmless."[1] Complainant seeks to have the rate for "Dextrose" applied to these shipments.

In support of its claim complainant has submitted for each shipment copies of the bill of lading, export declaration, and Abbott Laboratories invoices and packing lists. For each shipment the export declaration describes the commodities in question either as "Cerelose Powder," or "Cerelose Powder Anhydrous Dextrose" with a Schedule B Commodity No. of 061.9010. The Commerce Department Schedule B listing for No. 061.9010 is "Dextrose." Complainant has also provided a chemical dictionary extract which defines "Cerelose" as a trademark for a white, crystallized, refined dextrose.

Complainant originally submitted the claim to respondent through a freight auditing company. The freight auditing company sought to have the "Raw Drugs" description changed to "Cerelose Powder Dextrose" and also sought to have the billing for the shipment changed so that the rate on dextrose would be applied.

Respondent denied these claims for overcharge on the basis of Item 2(n) of its tariff which reads as follows:

"(n) Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum."

In reply to the complaint before the Commission, respondent acknowledged that the product shipped, "Cerelose," is indeed dextrose and, had the bill of lading described the true nature of the commodity being shipped, it would have been rated in accordance with the tariff. Respondent then states that allegations of complainant that an unlawful rate was assessed are refuted by the fact that the charges were based on bills of lading prepared by and submitted by complainant, a well-known firm which reasonably may be judged qualified to determine the correct nature of the items proffered for shipment.

[1] U. S. Atlantic and Gulf Venezuela and Netherlands Antilles Conference Tariff No. VEN-11, FMC-2.

DISCUSSION

The presiding Administrative Law Judge denied the claim in question based on the proposition that the carrier has the right to expect the shipper will properly identify the shipment. He concluded that "allowing an error as to Raw Drugs on the bills of lading, the use of the trade name Cerelose on the requests for correction entitled recognition of that trade name and the application of the tariff rate."

Complainant has excepted to the conclusions of the Administrative Law Judge. Complainant suggests that the Administrative Law Judge's reliance on Item 2(n) as a basis for denial of the claim is wrong. We agree. Item 2(n) provides how bills of lading will be rated by the carrier if the bill of lading describes articles by trade name. The bill of lading in this case did not describe the article by trade name but described it as "Raw Drugs." Complainant did, however, refer to the trade name of the commodity in later seeking to prove its exact composition; i.e. to show the carrier that Cerelose Powder is a trade name for dextrose. This, however, does not bring the trade name rule into play. Inasmuch as the trade name rule only governs rating of cargo based on description in *bills of lading* it could have no application to this proceeding. Additionally, we have recently reaffirmed the proposition that trade name rules govern only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. *The Carborundum Company v. Royal Netherlands Steamship Co., Docket 75-15 Report served January 5, 1977.*

As indicated above the Administrative Law Judge also supports his denial of the claim on the proposition that the carrier has a right to expect the shipper will properly identify the shipment. The Administrative Law Judge cites *Ocean Freight Consultants Inc. v. Italpacific Line,* 15 FMC 314, 319 (1972) to support this conclusion. While we cannot quarrel with this general proposition it should be noted that the *Ocean Freight Consultant's* case itself qualifies this proposition by stating that the shipper similarly has the right to expect the carrier to charge the proper rate for the actual goods carried and that where a mistake occurs the party who commits it has the heavy burden of proof to support a claim for rectification.

Inasmuch as there is no technical bar to consideration of the claim on its merits we turn then to the question of whether complainant, who erred in describing the shipment, has proven that the commodity in question qualifies for the tariff rate applicable to dextrose. It is clear from the documentation submitted that the shipments in question were of Cerelose powder. It has also been amply demonstrated that Cerelose Powder is in fact a form of dextrose. Respondent has in fact admitted in a letter to the Administrative Law Judge that "technical data received from the company reveals beyond doubt that Cerelose is indeed dextrose."

It is concluded from the evidence of record that complainant has sufficiently demonstrated that an overcharge occurred on these shipments. Respondent suggests, however, that it should not be found to have collected unlawful charges when the rate it assessed was based on information supplied by the party most informed about the nature of the commodity. The fact that respondent relied on information submitted by a "knowledgeable" shipper does not detract from the conclusion that a misrating occurred. Section 18(b)(3) of the Shipping Act, 1916, prohibits a carrier from assessing a charge greater, less or different than the rates specified in its tariff for a particular commodity or service. This section does not distinguish between knowing and inadvertent misratings. Either type is unlawful. Whether or not an unlawful charge is assessed knowingly may be a matter for consideration in determining whether to seek penalties for a violation but not in determining whether a violation occurred.

It is ordered that reparation in the amount of $1,396.56 be awarded complainant as a result of the overcharges found in this proceeding to have been assessed.

Vice Chairman Morse, concurring and dissenting.

I concur in the report in respect to the finding and conclusion that the tariff trade-name rule was inapplicable because the shipment was not described by trade name in the bill of lading. Hence, this case is one only of determining under which tariff commodity description the shipment properly falls.

I dissent as to the balance of the report on the basis of my dissenting opinion in Docket No. 75–15, *The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) N. V.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-27

ABBOTT LABORATORIES

v.

VENEZUELAN LINE

ORDER

The Federal Maritime Commission has this day served its Report in subject proceeding, which we hereby incorporate herein, in which we found that an inapplicable rate had been assessed for complainant's shipment.

Therefore for the reasons enunciated in the Report it is ordered that respondent Venezuelan Line be required to refund to complainant Abbott Laboratories the amount of overcharges in the sum of $1,396.56 with interest at six percent per annum if not paid within thirty days from the date of this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–15

THE CARBORUNDUM COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY (ANTILLES) N.V.

Question of applicability of Commission's *Kraft* decision to case seeking change in description of commodity declared on bill of lading need not be determined in view of Court of Appeals vacation of Commission decision in *Kraft*.

Carrier tariff rule requiring rating as N.O.S. when bill of lading description is by trade name is not applicable where trade name did not appear in bill of lading. Same tariff rule cannot in any event be used to preclude consideration by the Commission of nature of cargo when claim is filed.

Burden of proof is met where affirmative evidence is not refuted due to respondents failure to answer or otherwise appear.

Reparation awarded.

Harrison A. Harrington, Manager-Traffic, The Carborundum Company; attorney *William Levenstein* for complainant.

No response by or appearance for respondent.

REPORT

January 5, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners.*)*

PROCEEDINGS

This proceeding was instituted by a complaint filed by The Carborundum Company against Royal Netherlands Steamship Company (Antilles) N. V. Complainant alleges that respondent has subjected it to an ocean freight rate which is unjust and unreasonable and in violation of section 18(b)(3) of the Shipping Act, 1916. Respondent neither answered the complaint nor otherwise pleaded or appeared. Administrative Law Judge William Beasley Harris called for a hearing in the matter which was attended only by counsel for complainant. Complainant moved for judgment on the pleadings. Motion was denied. Complainant elected to

*Commissioner Bob Casey not participating.

stand on the matters already submitted, presented no witnesses, and opted for no brief.

Initial decision was served by the Administrative Law Judge on August 19, 1975, wherein he determined that the claim for reparation should be denied. The matter is before us on exceptions to the initial decision.

FACTS

Complainant is incorporated in Delaware with its place of business in Niagara Falls, New York. Its principal business is marketing abrasives, refractories, electronics and related products.

Respondent is a common carrier by water engaged in transportation between New York, New York and Kingston, Jamaica and as such is subject to the provisions of the Shipping Act, 1916.

Complainant shipped the cargo in question on October 14, 1974, under Respondent's bill of lading no. 147 for shipment from New York, New York to Kingston, Jamaica. The shipment is described in this bill of lading as "Drums: Silicon Carbide, Crude, Fused." The Respondent classified the shipment as Chemicals, N.O.S., Class 2 and assessed a rate of $99.00 per 2,000 lbs.[1]

Ocean Freight Consultants, Inc. (O.F.C.), on behalf of Complainant, filed a claim with Respondent dated December 24, 1974. In this claim, O.F.C. requested that the Respondent correct the freight classification by amending the bill of lading description to read "Abrasive Grain" and refund the difference between the Chemicals, N.O.S. rate of $99.00 per 2,000 lbs. and the abrasive grain rate of $70.00 per 2,000 lbs.[2] Respondent denied the claim stating that the bill of lading description controls the applicable rate. O.F.C. replied to the denial by letter, asserting that its claim on the Complainant's behalf was improperly denied and offered to submit Form 7403, a U. S. Department of Commerce and U. S. Customs form used for correcting descriptions on the Export Declaration. In this letter, O.F.C. referred to the Chemical Dictionary definition of "Silicon Carbide" which lists as its "uses": "Abrasive for cutting and grinding metals; grinding wheels; refractory in nonferrous metallurgy, ceramic industry, and boiler furnaces," and cross referenced "Carborundum," which is defined as a "Trademark for abrasives and refractories of silicon carbide, fused alumina and other materials."

Respondent again denied the claim and in so doing relied on Item No. 116, page 13–3 of the U. S. Atlantic & Gulf-Jamaica Conference tariff, which reads:

[1] U. S. Atlantic and Gulf Jamaica Conference Tariff No. JAM–8, 13th revised page 46, F.M.C. No. 1.
[2] Conference Tariff No. JAM–8, 9th revised, page 55.

(a) Claims by shippers for adjustment of freight charges will be considered only when *submitted in writing to the carrier within six months of date of shipment.* Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

On May 6, 1975, Carborundum filed this complaint with the Commission.

The complaint includes the above-mentioned information regarding the nature of the cargo. Additionally, the complaint includes a copy of a January 21, 1975 letter from complainant to O.F.C. transmitting respondent's invoice for the shipment in question. In this letter complainant states:

The commodity covered by this bill of lading is Silicon Carbide Abrasive Grains. This material is not to be confused with Silicon Carbide, Fused, Crude as the crude material, in itself, is not synonymous with Silicon Carbide, except that Aluminum Oxide, like Silicon Carbide, may be either "crude" or "in grains". Again, the material in this shipment was Silicon Carbide Abrasive Grains and we must concur with your claim for reclassification as "Abrasive Grain".

The attached invoice is dated September 27, 1973, lists as consignee Gore Bros. Ltd. of Half-Way-Tree, Jamaica, and describes the shipment as 77 drums of "Sic Grain" to be shipped per shipment # 09443. Bill of Lading No. 147 covering the shipment also refers to shipment #09443 and lists Gore Bros. Ltd. under the heading "Address arrival notice to."

DISCUSSION

The presiding Administrative Law Judge denied the claim in question both on the basis of respondent's tariff rules and on the basis of failure to meet the burden of proof.

The Administrative Law Judge found the claim should be denied because the claim is based on a change in description of commodity shipped and respondent's tariff Rule 116 quoted above prohibits adjustment in rates based on error in description unless the request for adjustment is brought prior to the cargo leaving the carrier's possession. The Administrative Law Judge discusses at some length complainant's contention that this claim does not involve a change in description but merely involves a question of which tariff item more properly applies to the given description. The Administrative Law Judge also discusses whether the Commission's decision in *Kraft Foods* v. *Moore McCormack Lines, Inc., 17 FMC 320 (1974)* is applicable and whether it would preclude recovery here. In *Kraft* the Commission had found that a tariff rule similar to Rule 116 would preclude recovery of a claim which was based on alleged error in "weight or measurement". The Administrative Law Judge found that the import of *Kraft* was such that it should logically be extended to also prohibit adjustments based on error in "description" where the tariff rule specifies that "weight measurement and description"

claims must be brought prior to shipment leaving the custody of the carrier.

The U. S. Court of Appeals for the District of Columbia Circuit has recently rendered an opinion vacating our order in *Kraft;* see *Kraft Foods v. FMC,* decided July 13, 1976. The Court has stated that a provision virtually identical to Rule 116 is not a valid tariff provision inasmuch as it sets up a period of limitation for consideration of a claim before the Commission which infringes on the rights granted by section 22 of the Shipping Act. In view of the Court's opinion in *Kraft* it is not necessary for us to consider whether our earlier decision in *Kraft* should be interpreted to cover changes in "description". It is clear from the Court's opinion that such a rule cannot act as a bar to our consideration of the claim on its merits.

The Administrative Law Judge also found that the claim should be denied because of the existence in respondent's tariff of Item 10(h) which provides:

> Bills of lading describing articles by trade names are not acceptable for commodity ratings. Shippers are required to describe their merchandise by its common name, to conform to merchandise description appearing herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum.

The Administrative Law Judge found that Item 10(h) is a lawful tariff rule applicable to rating bills of lading which reflect only trade names. He further found that since it is now contended by complainant that Silicon Carbide is a "Carborundum", a trademark of complainant, then, without more, the shipment is found to come under Item 10(h) of the tariff and to have warranted N.O.S. rating.

Complainant on exception correctly points out that Item 10(h) has absolutely nothing to do with this case. The shipment was described on the bill of lading as "Silicon Carbide", not as a Carborundum.Silicon Carbide is not a trade name, but is the common name for the article shipped. Item 10(h), by its own wording, can only be invoked when an article was described on the *bill of lading* by trade name (Emphasis ours). Accordingly, the Administrative Law Judge was in error in basing a denial of the claim on Item 10(h).

Further comment on Item 10(h) is appropriate in view of the Court's opinion in *Kraft.* As indicated above, the Court in *Kraft* determined that a tariff rule which in effect infringes on the rights granted by section 22 of the Act is invalid insofar as it governs filing of claims before the Commission. The rule in *Kraft,* did not by its language prevent the filing of a claim for reparation but did require claims to be rejected unless filed before the shipment left the custody of the carrier. The Court found that under such circumstances the right to file a claim becomes illusory once the carrier has delivered the shipment. Similarly, Item 19(h), if literally enforced, would make the right to file a claim illusory. Item 10(h) requires cargo described by trade name to be rated as Cargo N.O.S. Literally

enforced no further examination into the nature of the cargo would be permitted once the shipment is delivered, and no claim for adjustment of the rate to a more applicable specific commodity tariff item could be considered. Such a rule if used before the Commission to automatically defeat a claim, like the rule in *Kraft* infringes on the rights granted by section 22 of the Shipping Act to have claims considered which are brought within two years. Accordingly, we think an Item 10(h) type provision should be treated just as the *Kraft* rule provisions; i.e. claims cannot be defeated by simple reference to the rule but must be determined on the basis of the evidence as to the true nature of the cargo. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. Logic, fairness, and the message of *Kraft* so require.[3]

Much is made by carriers and their representatives, however, that rules of this type are reasonable attempts to require diligence on the part of a shipper or his representatives in describing the cargo on the bill of lading. This was exactly our earlier position in *Kraft*. We have also stated in the past that a carrier has a right to expect that a shipper will properly describe his cargo. So too we have stated that the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried.[4] However, the fact remains that even assuming good-faith effort on the part of both parties mistakes will be made and shippers will seek to bring claims before the Commission. The law specifically permits filing of such claims and the Court of Appeals in *Kraft* has specifically pointed out the previous error of our ways and has shown that a tariff provision, however well-intended, cannot be used to defeat that right to have a claim considered if brought within the statutory period of limitation.

The Commission has previously refused on other grounds to allow trade name rules of this nature to be invoked as a bar to Commission consideration of a claim. In *Ocean Freight Consultants v. Royal Netherlands Steamship Company,* 14 S.R.R. 1485 (1975) a majority of the Commission found a 10(h) type provision unenforceable inasmuch as it requires bills of lading using trade names to be rated as Cargo N.O.S. "as minimum". The "as minimum" provision was found to allow a standard which was too flexible and which presented the opportunity for discrimination between shippers.[5]

We now turn to the question of whether complainant has satisfied its burden of proof in this proceeding. We think it has. The Administrative Law Judge's decision to the contrary does not discuss the specific elements of proof presented by complainant. Rather the Administrative Law Judge's conclusion is based on a discussion of equities regarding size

[3] Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg-Amerika Lines,* 10 FMC 388 (1967).

[4] *Ocean Freight Consultants v. Italpacific Line,* 15 FMC 314 (1972).

[5] See also *Abbott Laboratories v. Prudential Grace Lines,* 17 FMC 186 (1973) for the proposition that under the language of such rules the bill of lading should not have been "accepted" by the carrier, and having accepted it the carrier cannot later complain.

and experience of shipper and frequency of shipments made. These considerations have nothing to do with proof of the nature of the commodity shipped, and in any event the Commission has previously disavowed equity theories regarding overcharge claims.[6]

The evidence shows that Silicon Carbide was shipped. The bill of lading so states and further indicates that it was "crude, fused". Complainant's letter of January 21, 1975 to O.F.C. suggests that the commodity covered by the bill of lading was "silicon carbide abrasive grains" and is not to be confused with "silicon carbide, fused crude". The letter further stresses that silicon carbide may be either "crude" or "in grains" but that this shipment was an "abrasive grain".[7] Complainant's invoice substantiates the contention that the shipment consisted of silicon grain. Chemical dictionary provisions establish that the granular forms of silicon carbide are in fact abrasives. It is concluded therefore that the shipment in question consisted of silicon carbide abrasive grain and is entitled to be rated under respondent's tariff provision "Grain, Abrasive". We think complainant has carried its burden under any standard of proof, especially inasmuch as respondent failed to answer, plead or otherwise appear throughout the course of the proceeding.[8]

Having determined that the shipment in question consisted of abrasive grains, the applicable charges should be computed at the rate specified therefor. Complainant suggests that reparation in the amount of $402.04 is due based on an applicable rate of $70 per 2,000 lbs. Respondent's tariff however indicates that this rate is applicable only to volume shipments which are defined as those in minimum lots of 21 measurement tons or 14 weight tons. The shipment in question consisted of 27,920 lbs. which is less than 14 weight tons and 348 cu. ft. which is less than 21 measurement tons. Accordingly, the shipment does not qualify for the volume rate. Rather it must be rated at the less volume rate for this commodity which is $83.50 per 2,000 lbs. Based on the applicable rate, the proper charge for the shipment including bunker surcharge and L and L charge totals $1,278.18. This represents a difference of $216.38 from the total actually assessed ($1,494.56).

Accordingly, complainant is entitled to reparation in the amount of $216.38. It is so ordered.

Vice Chairman Clarence Morse dissenting. I dissent. In my opinion, *Kraft* (CA–DC, 1976) is not controlling.

Tariffs frequently contain rules describing how shipments shall be described and providing penalties (higher rates) for failing to describe the shipment according to tariff commodity descriptions.

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[6] *Union Carbide Interamerica v. Venezuelan Line*, 17 FMC 181 (1973).

[7] Complainant's letter completely refutes its own contention that this claim does not involve a change in description "Crude" and "in grains" are different types of silicon carbide and a change from one to the other certainly involve a change in description. In view of our disposition of this case this self-refutation is not fatal to complainant's case

[8] See Rule 5 d (46 CFR 502.64) of the Commission's Rules of Practice which states that in the event responden should fail to file and serve an answer, the Commission may enter such rule or order as may be just. Accordingly complainant's allegations of fact may be deemed to be established.

The "trade name" rule[9] in this tariff is such a rule. These rules serve to establish two lawful rates for a shipment, one being the commodity rate when the shipment is described to match the tariff commodity description, and the second being the N.O.S. rate when the shipment is described in the bill of lading by trade name. In principle this is no different than a tariff rule which provides a given rate for a palletized shipment and a higher rate for the identical shipment if shipped not palletized. In each case the shipper has an option, in the one case as to the manner in which he describes his goods (by tariff commodity description or by trade name), and in the second case as to the method he chooses to make his shipment (palletized or not palletized). Having exercised his option the rate thereby applicable according to the tariff rules is the only lawful rate.

Let us consider another example—high valued cargo. Tariffs usually provide two rates for high valued shipments, one being a rate of, say, $50 W/M with a ceiling legal liability of $500 per package or the declared value whichever is the higher (46 U.S.C. 1304(5)). Assume a situation where a shipper makes a shipment and declares its true nature and value and therefore is charged a freight rate computed on the $50 W/M plus 5% of the declared value. Assume that the shipment is made and the goods are delivered at destination in sound condition. Assume that thereafter the shipper comes to us and asserts his shipping clerk or freight forwarder made a mistake in declaring the nature and value of the goods, for it was the shipper's initial intention to ship under the flat $50 W/M rate basis. Surely the majority would not hold it is a violation of the Shipping Act, 1916, for the carrier now to refuse to permit the shipper to retroactively amend his description of the shipment and, upon the carrier's refusal, order reparations in an amount reflecting the difference between the $50 W/M rate and the $50 W/M plus 5% of the declared value rate. Here, again, the tariff provided two options to the shipper, and having exercised his option, the shipper is bound by that election. In principle there is no difference between the foregoing example and the trade-name rule.

In my opinion these are valid, lawful rules and assure proper rating of shipments.

The effect of the majority's decision, absent (perhaps) fraud on the part of the shipper, is that despite such tariff rules and no matter how carelessly the shipper describes his goods to the carrier, the shipper can come to this Commission, prove that what was actually shipped (but described to the carrier, for example, by its trade name) when properly described matched a lower-rated tariff commodity description, and obtain a reparation award. Such a holding will provide little or no incentive to shippers or their freight forwarders to properly conduct their shipping activities.

In my opinion, absent a finding by us that the tariff rule (trade-name

[9] See Footnote [4], *supra*.

rule as an example) is unlawful, the majority decision is contrary to the intent and plain language of section 18(b)(3), Shipping Act, 1916, which directs that a carrier shall charge ". . . the rates and charges which are specified in its tariff on file with the Commission and duly published and in effect at the time". The trade-name rule and its derivative rate squarely fit that statutory directive.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-15

THE CARBORUNDUM COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY (ANTILLES) N.V.

ORDER

The Federal Maritime Commission has this day served its Report in subject proceeding, which we hereby incorporate herein, in which we found that an inapplicable rate had been assessed for complainant's shipment.

Therefore for the reasons enunciated in the Report it is ordered that respondent Royal Netherlands Steamship Company (Antilles) N.V. be required to refund to complainant The Carborundum Company the amount of overcharges in the sum of $216.38, with interest at six percent per annum if not paid within thirty days from the date of this Order.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-35

AGREEMENT NO. T-1685, AS AMENDED, AND T-1685-6: BETWEEN THE CITY OF ANCHORAGE AND SEA-LAND SERVICE, INC.; AND AGREEMENT NO. T-3130: BETWEEN THE CITY OF ANCHORAGE AND TOTEM OCEAN TRAILER EXPRESS, INC.

Agreement Nos. T-1685, as amended by T-1685-6, and T-3130, as submitted, are ambiguous, and cannot be approved until the parties modify the agreements to clarify the ambiguous language.

Agreement Nos. T-1685, as amended by T-1685-6, and T-3130 should be modified to ensure that Coastal Barge Lines, Inc. has sufficient terminal space available to it for cement discharging operations.

Agreement No. T-3130 should be modified to provide that Tote will have one preferential call per week at Anchorage except under certain specified emergency situations.

Agreement Nos T-1685, as amended by T-1685-6, and T-3130, as modified, are not unjustly discriminatory or unfair as between carriers, shippers, exporters or importers, nor operate to the detriment of the commerce of the United States, nor are they contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Totem Trailer Express, Inc. and the City of Anchorage have violated section 15 through implementation of Agreement No. T-3130 prior to approval.

Violation of section 15 by construction and use of trestles prior to approval does not, in itself, warrant disapproval of Agreement No. T-3130.

Leases to certain back-up areas are not subject to section 15.

Environmental issues in this proceeding do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Peter J. Nickles and *John Michael Clear* for The City of Anchorage, Respondent.

Gerald A. Malia and *Edward A. McDermott, Jr.* for Sea-Land Service, Inc., Respondent.

Stanley O. Sher, Jacob P. Billig and *David Shonka* for Totem Ocean Trailer Express, Inc., Respondent.

James E. Wesner for Tesoro-Alaskan Petroleum Corporation, Petitioner.

Alan F. Wohlstetter and *Edward A. Ryan* for Coastal Barge Lines, Inc., Petitioner.

John Robert Ewers and *Joseph B. Slunt,* Hearing Counsel.

REPORT

January 6, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

By Order of Investigation and Hearing dated September 15, 1975, the Commission instituted this proceeding to determine: (1) whether terminal Agreement No. T-3130, between Totem Ocean Trailer Express, Inc. (Tote) and the City of Anchorage, Alaska (Anchorage) and terminal Agreement Nos. T-1685, as amended, and T-1685-6, between Sea-Land Service, Inc. (Sea-Land) and Anchorage are unjustly discriminatory or unfair as between carriers, shippers, exporters or importers or operate to the detriment of the commerce of the United States or are contrary to the public interest or are otherwise in violation of the Shipping Act, 1916, within the meaning of section 15 of that Act; (2) whether said agreements should be approved, disapproved, or modified pursuant to section 15; and (3) whether section 15 has been violated by Tote and/or Anchorage by the construction of facilities provided for in Agreement No. T-3130 prior to the approval of said agreement by the Commission.

The Commission's Order of Investigation named Anchorage, Sea-Land and Tote as Respondents. Standard Oil Company of California, Western Operations, Inc.; Coastal Barge Lines, Inc. (Coastal); Puget Sound Tug and Barge Company; Tesoro Alaskan Petroleum Corporation (Tesoro);[1] and Shell Oil Company were made Petitioners in the proceeding.[2] Hearing Counsel also participated in the proceeding.

On January 30, 1976, the Commission issued an Interim Order disapproving Agreement No. T-1685, as amended through T-1685-6, effective February 5, 1976, unless the parties on or prior to that date filed an amendment suspending Sea-Land's preferential berthing rights during the months of February, March and April 1976. The need for such interim action stemmed from the fact that severe winter conditions at Anchorage posed a risk to Tote's vessel and crew at certain terminal facilities and that the only "safe" berthing areas were assigned to Sea-Land under the terms of its existing preferential berthing agreement with Anchorage. The parties failed to submit such a modification and Sea-Land's basic Agreement No. T-1685, as amended, was disapproved by the Commission.[3] The net effect of the Commission's interim decision was to plac both Sea-Land and Tote on an equal footing with respect to their operations at Anchorage, *i.e.,* on a first-come, first-served basis.

[1] Tesoro, an active and vigorous opponent against approval of both agreements, advised the Commission on November 3, 1976 that it no longer has an interest in the matters at issue in this proceeding.

[2] Standard Oil Company subsequently withdrew its protest and was dismissed from the proceeding. Shell Oil Company and Puget Sound Tug and Barge Company did not actively participate in the hearing.

[3] Since Agreement No. T-1685-6 does not stand alone but can only be considered as an integral part of the agreement which it amends, we consider the basic Agreement No. T-1685, as amended through T-1685-6 to be now before us for approval.

BACKGROUND

Anchorage's port facility consist of a single linear pier approximately 2200 feet in length divided into two-and-a-half cargo terminals and a Petroleum Off-Loading (POL) terminal.[4] The POL facility at the southern end of the pier consists of a 196-foot mooring dolphin, a 179-foot petroleum off-loading dock and a 237-foot bridge connecting this structure with Terminal 1. The POL terminal has four manifold connections for the transfer of petroleum.

Adjoining the POL facility is Terminal 1 which is 600 feet long and 47 feet wide. Terminal 1 has two manifold connections for the transfer of pertroleum. Between Terminals 1 and 2 are headers which are used for the receipt of bulk cement. These headers are used in the summer months by Coastal's cement barge which occupies approximately 440 feet of Terminal 2 when it is engaged in off-loading cement.

Terminal 2 is 610 feet long and 69 feet wide. It has no facilities for either off-loading petroleum products or bulk cement.

Terminal 3 is presently 366 feet long, however, there is a capital improvement plan underway whcih would extend Terminal 3 an additional 325 feet. Contracts have been let for the completion of Terminal 3, construction of Trestle No. 3, and a new Transit Area C immediately behind the terminal. This work is proposed to be completed by October, 1976. Anchorage is also planning a further northward extension of Terminal 3 and construction of additional trestles at that facility. It is anticipated that this expansion will be completed by October, 1978, although it could be completed as early as October, 1977 if Anchorage's construction schedules were accelerated.

Sea-Land has been serving Anchorage under a preferential berthing agreement since 1964. Currently, Sea-Land has four vessels in regular service with a fifth added in the summer to accommodate the heavier traffic. Sea-Land operates container vessels which are not suited to carrying outsized cargoes such as mobile homes which Tote will be able to transport on its vessel. Pursuant to Agreement No. T–1685–5 Sea-Land had preferential berthing rights at Terminal 1 for 104 calls per agreement year. Agreement No. T–1685–6, placed at issue in this proceeding, would shift Sea-Land's preferential berthing rights to Terminal 2 and increase its preferential calls from 104 to 156 calls per year. In addition, that agreement permits Sea-Land an additional 50 feet extending northward into Terminal 3 if it introduces larger vessels in the trade and establishes a need for the additional space.

Tote has initiated a regularly scheduled year-round water carrier service between Seattle and Anchorage in direct competition with Sea-Land. Tote's vessel, the *S. S. Great Land,* is a 790-foot long Ro-Ro vessel which requires about one-and-a-half of the Port's berths as well as special ramps and shore facilities to load and discharge its cargo efficiently.

[4] See Appendix for a sketch of the physical layout of the areas under discussion.

Agreement No. T-3130 allows Tote preferential berthing at the POL/ Terminal 1 location for 52 calls per year and also provides Tote with preferential rights to Transit Area B for 5 days per voyage.

POSITION OF THE PARTIES BEFORE THE PRESIDING OFFICER

Anchorage which owns, and through its Port, operates the Anchorage City Dock, requests approval of both Agreement Nos. T1685-6 and T-3130.

Tote requests approval of its own Agreement No. T-3130 and does not oppose Agreement No. T-1685-6. However, Tote opposes any approval of Agreement No. T-1685-6 without concurrent approval of its own agreement.

Sea-Land seeks approval of Agreement No. T-1685-6 but protests any approval of Agreement No. T-3130 on the grounds that it will increase land and water congestion at the Port, deprive Sea-Land of back-up areas, and because it was implemented prior to Commission approval in violation of section 15.

Coastal originally protested both agreements on the ground that it would not have access to cement headers located between Terminals 1 and 2 if Sea-Land was to occupy Terminal 2 and Tote Terminal 1. During the course of the proceeding an accommodation was reached between Sea-Land, Tote and Coastal with the concurrence of Anchorage, which would permit the simultaneous berthing of all three carriers at Anchorage. A further accommodation between Tote and Coastal would allow Coastal preferential use of a portion of Transit Area B.

Tesoro opposes approval of both agreements principally on the grounds that Tote's utilization of the POL/Terminal 1 location will not increase the availability of the facility to petroleum carriers as indicated by the proponents of the agreements; that neither Sea-Land nor Tote has demonstrated a serious transportation need to justify their preferences at the two facilities; and that Tote and Anchorage have violated section 15 by implementation of Agreement No. T-3130 prior to approval.

Hearing Counsel support approval of both agreements only if modifications are made in the agreements to clarify certain problem areas raised during the proceeding. These are: (1) the charges that would apply if the number of preferential voyages allowed under each agreement is exceeded; (2) the emergency powers of the Port Director; (3) the Coastal accommodation; (4) a firm commitment that Tote will be moved when Terminal 3 is completed; and (5) improvements in the petroleum handling capability of Terminal 1. In addition, Hearing Counsel is of the opinion that Tote and Anchorage have violated section 15 through prior implementation of Agreement No. T-3130 and that leases to certain back-up areas are possible section 15 agreements which should be filed for determination.

DISCUSSION

In his Initial Decision the Presiding Officer concluded that:

(1) Agreement Nos. T-1685, as amended, T-1685-6 and T-3130 are not unjustly discriminatory or unfair as between carriers, shippers, exporters or importers, nor operate to the detriment of the commerce of the United States, nor are they contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

(2) Agreement Nos. T-1685, as amended, T-1685-6 and T-3130should be modified and, as modified, approved.

(3) Tote and the City of Anchorage have violated section 15 by construction and use of facilities at Anchorage without submission to and prior approval by the Commission of an agreement for construction of facilities at Anchorage.

(4) Violation of section 15 by construction and use of trestles prior to approval does not, in itself, warrant disapproval of Agreement No. T-3130.

In so holding, the Presiding Officer found, *inter alia,* as follows:

(1) The modifications of the agreements are necessary to clarify that annual tonnage fees are applicable only against the specified number of annual preferential calls set forth in the agreements; that the Port Director may suspend preferential berthing rights when Port and vessel safety so necessitate; that space will be made available in Transit Area B for parking mobile homes; that space be available for off-loading cement; and that certain improvements be made for off-loading petroleum products.

(2) A serious transportation need exists for year-round general cargo waterborne service into the Port of Anchorage.

(3) A serious and important public interest exists in the transportation service offered by Sea-Land and Tote.

(4) Preferential berthing rights are vital to the proper performance of the services offered by Sea-Land and Tote to meet the transportation need of the Port and to serve the public interest.

(5) The agreements, taken together, have a pro-competitive effect.

(6)Neither agreement, as modified, will materially affect the operations of other users of the Port.

(7) The "random" theory in determining the probabilities of congestion at the Port is not applicable to regularly scheduled arrivals.

(8) The limited facilities at the Port warrant approval of these preferential use agreements to assist in attaining a more effective utilization of the Port.

(9) The preferential use agreements will help reduce delays to Sea-Land and Tote thereby reducing costs of their operation and aiding in maintaining regular schedules.

(10) Any delays to other carriers caused by preferential use of berths by Sea-Land and Tote are not likely to be material or result in substantial increase in costs to such other carriers.

(11) Leases of back-up areas, except Transit Area B, are not secton 15 agreements.

Finally, the Presiding Officer determined that the planned construction in the near future of a pipeline will materially reduce utilization of petroleum off-loading facilities and this, coupled with improved facilities for petroleum off-loading, will help relieve any delay in use of petroleum off-loading facilities which may be occasioned by the berthing of Tote's vessel.

Exceptions were filed by all the active participants in the proceeding. The positions of the parties on major findings and conclusions reached by the Presiding Officer in his Initial Decision are discussed below.

A. Modification and Approval of Agreement T-1685-6[5]

Sea-Land takes issue with the Presiding Officer's determination that:

> [T]he annual tonnage fees are applicable only against the specified number of annual preferential calls set forth in the agreement. Any calls during such year which exceed the number set forth in the agreement are otherwise deemed within the agreement but the fees for such calls shall be as otherwise set forth in the Port tariff.

Despite the Presiding Officer's finding that the proposed modification would have no bearing on any prior understanding of the parties, Sea-Land submits that the modification will affect and possibly prejudice a dispute between Sea-Land and Anchorage now pending before this Commission in Docket Nos. 75-48—*Sea-Land Service, Inc. v. The City of Anchorage, Alaska and Totem Ocean Trailer Express, Inc.* and 76-4—*The City of Anchorage, Alaska v. Sea-Land Service, Inc.*[6]

It is our opinion that the Presiding Officer's interpretation of the tonnage fees clause must be set aside. We find little support in the record for the Presiding Officer's interpretation that any calls in excess of the preferential number will be at the tariff rate. We also consider any ambiguity in a newly filed agreement a matter to be resolved by the parties to that agreement prior to any approval by this Commission.[7]

An ambiguity does exist in both agreements. There is no agreement between the parties as to what charges are to be paid once the preferential calls provided in the agreements are exceeded. In fact, and as heretofore indicated, Sea-Land and Anchorage are presently litigating this very issue before the Commission in other proceedings. We cannot approve the agreements as presently submitted. As long as the ambiguity exists the agreements are contrary to the public interest and cannot be approved.[8] Therefore, before approval can be accorded to the agreements under consideration, the parties will be required to modify the agreements to clarify the ambiguous language in the tonnage clauses. The clarification is to be submitted in conjunction with other modifications required herein. We wish to emphasize that the parties' modification of the tonnage clauses in this proceeding will in no way prejudice their rights or positions in other litigation now before us involving similar issues.

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[5] Certain of the following modifications also apply to Agreement No. T-3130 and, where applicable, both agreements are treated together.

[6] Docket No. 75-48 is a complaint proceeding filed by Sea-Land against Anchorage and Tote involving alleged violations of sections 15 and 16, First by Anchorage and Tote in connection with both agreements.
Docket No. 76-4 is a complaint filed by Anchorage against Sea-Land alleging that Sea-Land has violated section 15 by attempting to induce Anchorage to grant it special and preferential privileges not available to other carriers which are not granted by an agreement approved pursuant to section 15. One of the key issues for determination in both proceedings is the interpretation of the clause in the agreements relating to the charges to be assessed when either Sea-Land or Tote have exhausted their number of preferential calls under their respective agreements with Anchorage.

[7] While it may be argued that the Commission can resolve an ambiguity in a previously approved agreement such as Agreement No. T-1685, this rationale does not apply to Agreement No. T-3130 which is before us for the first time.

[8] On several occasions the Commission has pointed out that, "all agreements should be complete and the language used should be so clear as to eliminate all necessity for interpretation as to the 'intent' of the parties." *In the Matter of Agreement 6510*, 1 U.S.M.C. 775-778, 2 U.S.M.C. 22. See also *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556, 581, and *In the Matter of Agreement FF 71-7 (Cooperative Working Arrangement)*, 14 S.R.R. 609 where the Commission concurred in the Presiding Officer's conclusion that it would be "contrary to effective regulation to approve an agreement which is subject to various interpretations and involves uncertainties" at p. 614.

Coastal excepts to the Presiding Officer's failure to adopt a specific modification to Agreement No. T–1685–6 which would permit Coastal's barge to remain berthed at Terminal 2 while engaged in cement discharging operations. Coastal contends that although the Presiding Officer recognized a need for modification of both agreements to accommodate Coastal's off-loading cement operations and did modify Tote's agreement, he failed to discuss or adopt any modification with respect to the Sea-Land agreement. Accordingly, Coastal requests that a condition be attached to the approval of Agreement No. T–1685–6 which would ensure that Sea-Land would not interfere or interrupt Coastal's discharge of bulk cement at Terminal No. 2. In the alternative, Coastal requests that the agreement be amended to specifically require that Sea-Land berth its vessels at Terminal Nos. 2 and 3 in such a manner as to leave at least 237 feet of the southern portion of Terminal No. 2 available for Coastal's use during such times as bulk cement discharging operations require barge utilization of the facilities at that facility. This provision would allegedly permit the simultaneous berthing of Coastal, Sea-Land and Tote vessels.

Sea-Land, in its response to Coastal's exceptions, is agreeable to the alternative condition requested by Coastal provided that Coastal gives Sea-Land advance notice of any intended calls to minimize any berthing problem and provided a space on Terminal No. 3 is available.

We agree with Coastal's request, concurred in by Sea-Land, that Agreement No. T–1685–6 should be modified to make 237 feet of the southern portion of Terminal No. 2 available for Coastal's use during such time as bulk cement discharging operations require barge utilization of the facilities at Terminal No. 2. Such space need be made available, however, only to the extent that sufficient berthing space is open at Terminal 3 for use by Sea-Land vessels. Coastal will be expected to provide Sea-Land with reasonable advance notice of its intention to call at the facility, but in no event should this notice be less than seven days. Since Coastal provides a weekly service to Anchorage it should know seven days in advance when it will call at the Port.

Unless Agreement No. T–1685–6 is modified in accordance with the conditions specified herein, it would be contrary to the public interest and not approvable inasmuch as it would severely limit Coastal's ability to call at Anchorage. Coastal needs access to the cement headers, and the utilization of Terminals 1 and 2 by Tote and Sea-Land, respectively, coupled with the time required to service Coastal's barge, would result in substantial detriment to Coastal in the discharging of bulk cement at Anchorage.

For the same reasons we agree with the modifications of Agreement No. T–3130 proposed by the Presiding Officer with respect to the berthing of Coastal's barge in a portion of Terminal 1.

B. Modification and Approval of Agreement No. T-3130

Sea-Land excepts to the finding of the Presiding Officer that the preferential use of Transit Area B by Tote "should not result in any detriment to other users of the port." Sea-Land argues that it should have access to back-up areas adjacent to its preferential berths. As approved by the Presiding Officer, Agreement No. T-3130 gives Tote Transit Area B which is directly behind Terminal 2 while under Agreement No. T-1685-6, Sea-Land's marshalling area is directly behind Terminal 1. This, of course, results from the fact that when Sea-Land was at Terminal 1 its back-up area was adjacent to its berth. Sea-Land believes that Transit Area B should be reallocated to it and, in turn, Sea-Land would turn over Lot 12-A (which is behind Terminal 1) to Tote in exchange for Lot 3-A (which is behind Terminal 2).

Both Anchorage and Tote oppose Sea-Land's suggestion. Tote argues that certain of the areas in question are not included in the pending agreements and the Commission properly has no interest in the manner in which the Port leases these properties.[9] Both Anchorage and Tote believe that Sea-Land's proposal would work a disadvantage to Tote inasmuch as Lot 12-A, from an operational point of view, is marshy and only about one-third the size of Transit Area B.

Tesoro, the only party still opposed to approval of both agreements, filed lengthy exceptions to the Presiding Officer's Initial Decision. Tesoro's major objection is addressed to the Presiding Officer's rejection of Tesoro's "queing theory." Tesoro's "queing theory" is a statistical technique used to predict the degree of port congestion which would result if the Tote and Sea-Land preferential agreements were approved. The theory employs a formula based on the relationship between the frequency with which the users of a given facility arrive at that facility and the average length of time needed to serve them. This theory assumes that arrival and service rates are random, that arrivals will conform to the "poisson" probability distribution and that service rates will conform to the exponential probability distribution. Tesoro's testimony in connection with the use of the queing theory is both extensive and complex.

The Presiding Officer rejected the testimony of Tesoro's witness on the grounds that the queing theory assumed both random service time and arrival rates. The Presiding Officer specifically found that as regards Tote's potential operation under the preferential agreement its service time and arrival rate should not be considered random. The Presiding Officer found that Tote's proposal to operate a regular scheduled service coupled with the requirement that it notify the Port 15 days in advance of scheduled arrival times destroys the validity of the queing theory espoused by Tesoro.

Tesoro's response to these arguments is that there was a total "misstatement on Judge Levy's part of what the testimony actually was."

[9] The issue of whether these latter agreements should be filed for section 15 approval is discussed later.

Tesoro contends that its expert witness did not ignore the effects of scheduling in his analysis of the Anchorage situation, and indeed made adjustments in his results to account for scheduling.

Also at issue is the Presiding Officer's finding that "paradoxically" Tesoro treats Tote's operations as random but does not apply the theory to Sea-Land's operations which are also conducted on a scheduled basis. Tesoro explains that the queing theory was not applied to Sea-Land because there was no point in doing so inasmuch as the objective was to ascertain the impact of the preferential agreements on other users. Since Sea-Land would, because of the number of preferential calls provided in its agreement with Anchorage, in effect, completely occupy the terminal to which it is assigned, Tesoro explains that there was no purpose in applying the queing theory to Sea-Land because whatever conflicts might result at that terminal would only affect Sea-Land.

Tesoro also disputes the Presiding Officer's findings that other users of the Port can schedule their operations around Tote's arrivals so as to avoid berthing conflicts when Tote is at berth. Allegedly, Tesoro is unable to maintain a regular schedule because of navigational problems, winterized conditions and tide conditions at Nikiski. The Presiding Officer's conclusion that Tesoro has the ability to improve the efficiency of its own operation is, according to Tesoro, completely at variance with his own earlier findings and must be disregarded.

Various arguments are also raised by Tesoro in opposition to the Presiding Officer's conclusion that approval of both agreements would serve a serious transportation need. The position taken by Tesoro on this point is essentially a reargument of contentions advanced before the Presiding Officer. In short, Tesoro's position is that efficient utilization of Anchorage's facilities would be promoted if all preferences were denied.

Tesoro submits that Tote's service is not "unique" and that the record fails to show that there is any substantial demand for additional service to Anchorage. There has been allegedly no showing by the proponents of Agreement No. T-3130 that the public would benefit more from the uninterrupted receipt of dry cargo than from uninterrupted access to petroleum products or other goods.

Tesoro also opposes any approval of Agreement No. T-1685-6. Tesoro is of the opinion that the Presiding Officer's conclusion that Sea-Land's agreement is justified because "the considerations which led the Commission to approve the initial preferential use agreement between Sea-Land and Anchorage are unchanged," is erroneous. Tesoro argues that everything has changed at the Port. Increased traffic and a new carrier at the Port have allegedly placed unprecedented demands on Anchorage's facilities. Tesoro submits that the Presiding Officer failed to consider whether Sea-Land's agreement was in the public interest in view of these changed circumstances.

Finally, Tesoro contends that the Presiding Officer improperly failed to incorporate two of Tesoro's proposed modifications into his approval.

Tesoro had urged that if the proposed agreements are approved, such approval should be subject to the following conditions:

1. Agreement No. T-3130 should be amended to require immediate improvement of the petroleum off-loading facilities at Terminal 1.

2.Both agreements should be suspended between November and April.

3. Agreement No. T-3130 should be approved for only one year, subject to renewal if Tote's relocation to Terminal 3 is not feasible.

The Presiding Officer accepted the first condition but rejected the latter two.

Tesoro maintains that because of ice conditions its barge service is restricted during winter months and in order to keep up oil supplies it must make as many deliveries as possible during periods of good weather. Tesoro's ability to do this will allegedly be severly hampered if Tote is at Terminal 1 on a preferential basis during the winter. For this reason Tesoro requests an annual suspension of Agreement No. T-3130 from November to April.

Tesoro argues that limiting whatever approval is accorded Agreement No. T-3130 to one year will ensure that a "temporary" location does not become a permanent arrangement.

Anchorage, in response to Tesoro's Exceptions, is of the opinion that Tesoro will be affected less by the preferential berthing rights under Agreement No. T-3130 than it was under Agreement No. T-1685. While acknowledging that Tote will restrict access to both the POL and Terminal 1 facilities when it is on berth, Anchorage concurs in the Presiding Officer's finding that the total time available to petroleum users at both the Pol Terminal and Terminal 1 will be significantly increased.[10]

Tote and Hearing Counsel advance similar arguments supporting the Presiding Officer's finding that Tesoro will be affected less under the new arrangement than with Sea-Land at Terminal 1. Tote argues that this is especially true when one considers that: Nikiski (where Tesoro has its refining facility) is only 60 miles from Anchorage; Tote has obligated itself to notify carriers of its schedule, and any variations therefrom; and Tote has agreed to cooperate in resolving any conflicts that may arise. According to Tote, Agreement No. T-3130 will minimize delays for all petroleum users and particularly Tesoro.

Tote and Anchorage both challenge Tesoro's "attempts to supplement its evidence with what it calls 'utilization analysis.' " While Tote objects to the "new and unsupported material" on procedural grounds, it does address Tesoro's arguments on exception. Thus, Tote argues that one of Tesoro's major propositions *i.e.*, that users of Terminals 2 and 3 will flock to Terminal 1, is directly contrary to the testimony of Tesoro's expert

[10] The Presiding Officer found that the potential time the POL facility and Terminal 1 will be occupied because of Tote's agreement would be 25 percent leaving each facility free 75 percent of the time for petroleum users. Under Agreement No. T-1685, Sea-Land blocked access to Terminal 1 60 percent of the time, and with the proposed amendment, Sea-Land would block Terminal 1 80 percent of the time.

witness at the hearing. Both Anchorage an Tote conclude that there is no basis in the record for Tesoro's assumption in this regard.

The Presiding Officer's rejection of Tesoro's "queing theory" is also supported by Tote and Anchorage. One of the Presiding Officer's criticisms of Tesoro's theory was that it is not applicable to Sea-Land's operations because Sea-Land operates on a scheduled basis. On exception, Tesoro argues that the Presiding Officer misinterpreted the testimony. Both Anchorage and Tote seize on this point contending that the transcript clearly shows that Tesoro's witness specifically stated that ". . . since Sea-Land can schedule itself its arrivals, its operation is not compatible with queing theory." Tote argues that since it plans to operate on a regular scheduled basis the queing theory is also not applicable to its operations.

Tote details other alleged deficiencies in Tesoro's queing theory including its failure to take into consideration the impact resulting from the disapproval of both agreements. While Tesoro has set forth the dollar impact of three berthing alternatives, it failed to weigh the impact on Tesoro of disapproval of both agreements. The benefit, even to Tesoro, from this approach cannot be determined, and for this reason Tote believes that Tesoro's request for disapproval must be rejected.

We find no basis to set aside the Presiding Officer's rejection of Tesoro's "queing theory." As stated, the classic "queing theory" assumes both random service times and arrival rates. Tesoro's witness recognized that Tote would operate on a reasonably regular basis and reduced his theoretical calculations by one half. However, this reduction was completely arbitrary and evidences the difficulty of adopting a highly complex theory to a relatively practical terminal operation.

Even assuming, *arguendo,* that the conclusions reached by Tesoro through utilization of the "queing theory" were valid, they do not sway us to a finding that Agreement No. T–3130 should be disapproved. Tesoro's "bottom-line" figure for adjusted waiting times for oil barges and tankers with Tote having a preference at POL/Terminal 1 and Sea-Land at Terminal 2 is an increase of three hours over the adjusted waiting times in the base case where Sea-Land remains at Terminal 1. According to Tesoro, this delay translates into additional costs of $505,000.

The calculations used to derive the three hour figure are all theoretical and do not provide a sufficient basis for disapproving Agreement No. T–3130. An example is the arbitrary reduction of one half taken by Tesoro to account for Tote's scheduled operations. Also, in computing the alleged cost resulting from the additional delay, Tesoro used trucking costs exclusively and ignored the alternate method of tankers which are significantly less expenive than trucks. While the tankers would also have been delayed, this is still a viable alternative open to Tesoro. Tesoro also fails to consider the costs to Tote if its preference at POL/Terminal 1 is denied.

The critical determination with respect to approvability of both agree-

ments is whether they are "unjustly discriminatory or unfair as between carriers, shippers, exporters or importers, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or are otherwise in violation of the Shipping Act, 1916," within the meaning of section 15 of that Act. While we do not necessarily agree with all the conclusions reached by the Presiding Officer, it is our opinion that there is no basis in the present record for disapproval of either agreement.

Certainly, Tote's service is in the public interest in that it provides a fast and alternative viable service to the shippers in Anchorage. The question then becomes whether the granting of a preferential berthing arrangement to Tote and Sea-Land is contrary to the public interest or otherwise contrary to the standards in section 15 because of its effect on nonpreferential users. While, admittedly, both agreements will result in certain delays and disruption of operations of other carriers, such as Tesoro, it is our opinion that, overall, these delays and disruptions will be minimal and certainly not of such magnitude to preclude approval of the agreements.

In considering the positions of the various parties and reaching a determination of where the public interest lies, we must weigh the short-range objections of Tesoro against the long-range impact of both agreements on the Anchorage community. Tesoro has admitted that it will utilize the oil pipeline linking Nikiski and Anchorage which is now under construction. While a firm date for completion of the pipeline has not been set, the record indicates that it will probably be within the next six months. Our consideration of both agreements must take into account the public interest factor as it exists at the time of our approval; however, we cannot ignore the fact that Tesoro, the only party still vigorously opposed to approval, will have significantly less dependency upon the Anchorage docking facilities once the pipeline is completed. Again, with the exception of the evidence relating to the modifications discussed herein, the record will not support a finding that either agreements is contrary to the public interest and therefor not approvable.

Tesoro's remaining exceptions relating to the Presiding Officer's failure to incorporate two proposed modifications in the agreement must also be set aside for the reasons discussed above. In our review of both agreements we took into consideration weather conditions and their effect on all users of the Port's facilities. Tesoro's request for a suspension of both agreements between November and April because of the impact of weather conditions on its operations is not sufficiently supported in the record to warrant the modification as a condition of approval. We also find no basis upon which to limit the approval of Agreement No. T-3130 to one year. That the Port intends to relocate Tote to Terminal 3 when that facility is completed is insufficient, in and of itself, to support a finding that approval for a period of more than one year would be contrary to the public interest.

C. Violations of Section 15 by Tote and Anchorage

Both Anchorage and Tote excepted to the Presiding Officer's finding that they violated section 15 by carrying out an agreement for the construction and use of facilities at Anchorage without prior approval by the Commission. However, the Presiding Officer also determined that this violation of section 15 did not, in itself, warrant disapproval of Agreement No. T-3130.

The Presiding Officer based his determination of a violation prinicpally on the finding that the trestle agreement "is so much a part and parcel of the preferential use agreement as to be inseparable therefrom" and that "but for use by Tote in connection with preferential berthing there would be no sense in its undertaking."

Anchorage on exception takes the position that the trestles were necessary for Tote's *non*preferential use of the Port's facilities and without the trestles, Tote's ability to remain in the trade on a nonpreferential basis would have been materially prejudiced. Thus, Anchorage submits that the construction agreement is not tied to the preferential berthing agreement and the construction agreement, standing alone, is not subject to section 15. The agreement allegedly confers no special and preferential privileges upon Tote and could be utilized by other users at the port.

In support of their contention that construction and use of the trestles does not violate section 15, Anchorage and Tote rely on the Commission's pronouncement in *Agreement Nos. T-2108 and T-2108-A,* 12 F.M.C. 110, 125 (1968) that:

> [I]f a port is prohibited from improving its facilities in contemplation of entering into and obtaining Commission approval of an agreement providing for a return to the port of its investment, progress would be unnecessarily and severely limited. The construction of improvements is not carrying out the agreement. It is the commencing of the preferential use that causes the agreement to be in effect. (p. 125)

The Presiding Officer found that Anchorage and Tote's reliance on that case was misplaced. In his view, the instant situation could be clearly distinguished on the basis that: "Anchorage did not construct the facility as a preliminary to leasing. The potential user undertook the construction."

Both Tote and Anchorage are of the opinion that the Presiding Officer's attempt to distinguish the case on the basis that it was Tote that paid for and constructed the trestles as opposed to the Port is "truly a distinction without a difference." According to Tote, the decision in *Agreement No. T-2108, supra,* stands for two propositions:

> . . . (1) 'mere construction,' without preferential use, does not constitute carrying out of the agreement; and (2) construction, without preferential use, is, in any event, justifiable when delay would deter progress.

The parties argue that the trestle construction agreement is not subject to section 15 for two reasons. First, the actual agreement between the

parties relating to the construction of the trestles is allegedly set out in a distinct, separate, agreement. As such, it is submitted that no preferential rights or special privileges are conferred upon Tote by the trestle construction agreement and therefore that agreement, by itself, is not subject to section 15. Second, Tote and Anchorage contend that if it is determined that the construction of the trestles is included within Agreement No. T-3130 and a part thereof, there has allegedly been no violation of section 15 because Tote has not exercised a preference to the facilities.

Hearing Counsel and Tesoro support the Presiding Officer's findings with respect to the violations of section 15. Hearing Counsel point out that Anchorage and Tote admit that the trestles were constructed under the same terms and conditions set forth in Agreement No. T-3130 and that Tote had exclusive use of the trestles. In this regard, Hearing Counsel cite Docket No. 72-61, *In the Matter of Agreement Nos. T-2455/T-2553*(1974), wherein the Commission affirmed the Presiding Officer's finding that:

> . . . once it is determined that a particular part requires that the agreement be filed pursuant to that section, the statute is clear that the entire agreement must be filed—not only the clause giving rise to jurisdiction. And that before approval, no part of that agreement may be implemented. (p. 20 mimeo opinion).

The Presiding Officer determined that the parties violated section 15 in either of two ways: (1) by considering that the construction of facilities are provided for in Agreement No. T-3130 and that the actual construction prior to approval is a violation of section 15, or (2) by considering the construction agreement as a separate and distinct agreement which has been implemented prior to filling and approval by the Commission.

While either approach would be acceptable to Hearing Counsel, they favor the former, *i.e.* that the construction of the trestles was an integral part of Agreement No. T-3130 and that the arrangement between the parties relating thereto should be filed as an amendment to that Agreement.

Tesoro, while agreeing generally with Hearing Counsel, takes issue with the Presiding Officer's finding that the violations do not warrant disapproval of Agreement No. T-3130. Tesoro would distinguish those cases cited by the Presiding Officer in support of his finding that a violation of section 15 does not necessarily preclude approval by the Commission of the Agreement.

Equally without merit, according to Tesoro, is Tote's contention that the Commission has no jurisdiction over the construction agreement because it does not "create on-going rights" which require "continuous Commission supervision." *F.M.C. v. Seatrain Lines, Inc.*, 411 U.S. 726, 731 (1973). Tesoro points out that the indemnification provisions set forth in the construction agreement create on-going rights which survive the completion of construction and which should be of concern to the

Commission because they purport to insulate Anchorage from the consequences of prior implementation of the Agreement.

We affirm the Presiding Officer's findings of section 15 violations on the part of Tote and Anchorage. The construction agreement should be considered a part and parcel of Agreement No. T-3130[11] and the construction and use of the trestles prior to approval of the Agreement is a clear violation of section 15. The construction and preferential use of the trestles is described with sufficient particularity to include it within Agreement No. T-3130. That agreement is replete with references to the trestles and whole sections of the trestle construction agreement are repeated *verbatim* therein.

The Presiding Officer correctly found Anchorage's and Tote's reliance on *Agreement Nos. T-2108 and T-2108-A, supra,* was inappropriate. In that case the Port of Los Angeles undertook certain improvements contemplated in the agreement before Commission approval. However, those improvements were only part of the extensive construction undertaken by the Port. In addition, the initial construction by Los Angeles was a unilateral action by the Port. Here, the construction of the trestles was specifically geared to Tote's operations and Tote was responsible for the construction of the trestles at Anchorage's terminal under the Port's supervision.

Finally, Agreement No. T-3130 provides that Tote shall have preferential use of the trestles. The record herein shows that Tote has had exclusive use of the trestles since they were completed. Despite Anchorage's assertion on exception that other carriers at the Port could have used the trestles upon request, there is testimony that Tote stored its ramps on the trestles thereby restricting their availabiltity to other users. Tote argues that our Order of Investigation phrased the issue of the trestles in terms of their "construction," not "use," but surely it cannot be seriously argued that there is less of a violation when it is determined that they were not only constructed but actually used on an exclusive basis prior to approval. We conclude, therefore, that both Tote and Anchorage have violated section 15 through the construction and use of the trestles set forth in Agreement No. T-3130 prior to approval by this Commission.

This conclusion does not, however, contrary to the assertions of Tesoro, preclude the approval of Agreement No. T-3130, if it is otherwise approvable under the standards of section 15. See *Agreement No. 8905—Port of Seattle and Alaska, S.S. Co.*, 7 F.M.C. 792, 799 (1964); *In the Matters of Agreement Nos. T-2455/2553, supra,* p. 458; and *Agreement No. T-2598,* 14 S.R.R. 573, 581 (1974). Also, *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 221 (1966).

[11] While we are basing our finding of a violation of section 15 herein on a determination that the construction agreement is included within Agreement No. T-3130, it is also our opinion that the construction agreement taken by itself would be subject to section 15. *Greater Baton Rouge Port Commission v. United States,* 287 F.2d 86, 92 (1961).

D. Introduction of a Second Tote Vessel

On exception, Hearing Counsel point out tha Agreement No. T-3130 is not limited to a single vessel and does not limit Tote to one preferential call per week but refers instead to 52 vessel calls per agreement year.

In this connection, Hearing Counsel request the Commission to take official notice of a report appearing in Traffic World (May 3, 1976) to the effect that Tote planned to place a second vessel in the Alaskan trade. In order to avoid any future misunderstandings, Hearing Counsel recommend that Agreement No. T-3130 be modified to specify that Tote will have the right to one preferential vessel call per week rather than 52 per year.

Tesoro requests that the proceeding be reopened to receive additional evidence concering Tote's plans for the introduction of a second vessel. According to Tesoro, the introduction of a new vessel into the trade would invalidate most, if not all, of the Presiding Officer's conclusions and necessitate reconsideration of the entire preferential berthing issue.

Both Tote and Anchorage consider Tesoro's request to reopen the proceeding as an attempt to delay approval of the agreements and to be without merit. While Anchorage generally supports the modification suggested by Hearing Counsel, Tote does not. Tote admits the introduction of a second vessel and explains that while it has no intention of "bunching" preferential voyages, some flexibiity is needed to compete and serve the needs of the shipping public. Furthermore, there are allegedly numerous events beyond its control such as weather, vessel repairs, etc. which could occasionally cause a delay and which could result in Tote's losing a preferential voyage. Tote argues that because its agreement requires 15 days' notice for a preferential call, it would be impossible for a replacement vessel to make that preferential call within the same week in the event that the primary vessel broke down or was delayed by weather. For these reasons, Tote has advised that a "concrete limitation of one call per week is not reasonable for it is far too harsh and results in total inflexibility."

The testimony in the record relating to approval of Agreement No. T-3130 is premised on the understanding that Tote would serve Anchorage with one preferential call per week. The Initial Decision of the Presiding Officer was also based on this assumption. Tote now states that it intends to exercise its right to make its 52 preferential calls as demand merits. The impact of what Tote now proposes is not determinable on the present record and would require a complete evidentiary review. We see no reason to burden the parties by remanding the proceeding for further hearings on this limited point; instead, we intend to hold Tote to the terms of Agreement No. T-3130 and require that it berth its vessels on a preferential basis "approximately one time per week." "Approximately" means that Tote will be limited to one preferential call per week *unless* it is unable, by reason of weather conditions, an emergency to its scheduled

vessel, or other conditions beyond Tote's control to make a preferential call at Anchorage during a given week. Only in the event that Tote is unable to make a preferential vessel call during a particular week because of circumstances beyond its control, will it be permitted to double its preferential calls in a subsequent week. As an alternative to Tote's doubling its preferential calls because of unforeseen circumstances described above, Tote may employ a replacement vessel to make a scheduled preferential call without providing the 15 days' notice. Further, Tote will provide Anchorage with prompt notice of its inability to make a preferential call as scheduled, and its intent to either (1) double its call in a subsequent week, or (2) utilize a replacement vessel to make the weekly preferential call.

E. Unfiled Section 15 Agreements

Hearing Counsel excepts to the Presiding Officer's determination that certain leases to back-up areas at Anchorage are not section 15 agreements. The leases in question were never introduced into the hearings. Hearing Counsel's attempt to enter the leases as late-filed exhibits was rejected by the Presiding Officer. On brief, Hearing Counsel once again raised the question of the leases and their subjectivity to section 15. In his Initial Decision the Presiding Officer noted that the Commission Order instituting this proceeding did not include as an issue the matter of the back-up leases and that "a serious question now arises whether the introduction of this issue at the briefing stage by Hearing Counsel violates the notice provisions for due process."

However, to avoid a subsequent remand on this issue, the Presiding Officer considered the leases to the back-up areas and found them not subject to section 15. This determination was based on a finding that the leases appeared to be routine real estate transactions involving nothing more than a landlord-tenant relationship. Citing the Commission's interpretative rulings (46 C.F.R. 530.5), he concluded that such agreements are not subject to section 15 "and that in order to bring such an agreement under section 15 some of the activities described in that section must be covered by the agreement." in the back-up leases. In so doing, he rejected Hearing Counsel's argument that the leases are part of the same integrated operation as the subject Agreements and may effect Anchorage's operations.

The Presiding Officer was also not persuaded by Hearing Counsel's arguments that similar leases between Sea-Land and Anchorage were filed and approved by the Commission pursuant to section 15. The Presiding Officer is of the opinion that the Sea-Land leases were also not within the scope or purview of section 15 "and the Commission's routine approval thereof is not to be considered a definitive ruling that they were required section 15 submissions."

It is our opinion that the Presiding Officer erred in his disposition of this matter. Since the Presiding Officer refused to allow Hearing Counsel to

enter the leases into evidence as late-filed exhibits his subsequent consideration of the merits of the agreements was improper. However, with two exceptions, we do not disagree with his ultimate conclusion that the back-up leases are not section 15 agreements.

Our Order of Investigation, while not specifically addressing the issue of back-up leases, was sufficiently broad enough to encompass not only the preferential berthing aspects of the two agreements, but any other agreements which comprised the complete understanding between the parties.

Hearing Counsel's allegations raised the issue of whether the complete agreements were before the Commission. These substantive allegations should have been considered by the Presiding Officer. He should have admitted the back-up leases into evidence and his refusal to do so was error.[12]

However, a resolution of this particular issue does not require our remanding the proceeding to the Presiding Officer. The existing record is sufficient to permit the Commission to make a determination regarding the back-up leases.

Notwithstanding the Presiding Officer's refusal to permit the subject leases to be introduced into evidence, the matter of whether such leases are subject to section 15 was discussed by Hearing Counsel and Anchorage in their briefs. The matter was also addressed by Hearing Counsel in their exceptions to the Initial Decision to which Anchorage and Tote responded. Further, there is testimony in the record relating to the back-up leases.

Therefore, the following agreements are admitted as late-filed exhibits and designated as follows:[13]

1. Lease between Sea-Land and Anchorage dated December 10, 1970 pertaining to the lease of Lots 5A and 5B (now redesignated 5C) at the Port of Anchorage—Exhibit No. 124.

2. Assignment of a lease from Jack E. Cole and Donald D. Emmal to Sea-Land, with the consent of Anchorage, a lease dated September 28, 1973 pertaining to the lease of Lot 5F (now redesignated 6D) at the Port of Anchorage—Exhibit No. 125.

3. Lease between Tote and Anchorage dated July 24, 1975 pertaining to the lease of Lots 3A and 2B at the Port of Anchorage—Exhibit No. 126.

Upon examination of the above leases and review of the record in this proceeding as it relates to those leases, we find that the Presiding Officer was correct in finding that these back-up leases are not subject to section 15. This determination is based not only on a review of the agreements standing alone, but on a consideration of the interrelationship between the

[12] No objections were raised by the parties to the introduction of the leases when they were originally submitted by Hearing Counsel.

[13] The two Sea-Land back-up leases executed with Anchorage in 1964/1965 (Agreement Nos. T-1685-A and T-1685-A-1) were routinely filed and approved as section 15 agreements when originally submitted. Whatever prompted that approval in 1964/1965, there is nothing in the record in Docket No. 75-35 which necessitates our disturbing that action here.

preferential leases and the leases for the back-up areas. There is no proper basis in this record upon which we can find that the back-up leases were part of the total understanding between the parties.

Of the leases in question, only the lease between Tote and Anchorage covering Lots 3A and 2B was negotiated after 1974 and there is testimony regarding the sequence of events leading up to the effectuation of this lease. While the preferential berthing and the back-up areas "cover areas in the same locale," as discussed in *Agreement No. T-4, supra,* there is no adequate showing that the "activities accomplished in this property are essential to [Tote's] integrated containerized operations." Based on prior Commission determinations the two Sea-Land leases executed in 1970 (Exhibit No. 124) and 1973 (Exhibit No. 125), standing alone, are not subject to section 15. Moreover, we find no evidence in this record that these leases are so related to the preferential berthing agreement to bring them within the purview of section 15

For these reasons we concur in the findings of the Presiding Officer that, on the facts before us in the record, the particular leases to back-up areas described above are not sbject to section 15.

F. Pipeline Construction

Tesoro takes issue with the Presiding Officer's conclusion as to the "probable abandonment of barge service by Tesoro in the not too distant future" because of construction of an oil pipeline linking Nikiski to Anchorage. Tesoro argues that the Commission should reject this conclusion because it is not supported by the record and the future of the pipeline is uncertain because of the lack of adequate financing.

Whatever merit there may have been to Tesoro's exception has been mooted by Tesoro's admission during oral argument that Tesoro has purchased the pipeline which is now under construction. It is inconceivable that Tesoro will not utilize the pipeline once it is completed. Indeed, Tesoro's vice-president testified that his company would use the pipeline for transporting its products from Nikiski to Anchorage. However, while the effect of the pipeline on Tesoro's operations is of some relevance in our consideration of the pending agreements, there is adequate evidence in the record to reach a determination with respect to both agreements without undue resort to the pipeline issue.

G. Other Modifications

The Presiding Officer conditioned his approval of the agreements on the parties modifing them in certain other respects. The majority of those modifications reflect accommodations reached between the parties. For example, under Agreement No. T-3130, Tote is to clear space in Transit Area B to accommodate Coastal's cargoes. Coastal, in turn, is to give five days' notice to Tote and must clear the assigned area as rapidly as possible. There is no finding by the Presiding Officer that Coastal will be harmed by its non-preferential use of Transit Area B, or that the

agreement as presently drafted in this regard fails to meet the approval standards of section 15, nor is there any proper basis in the record in this proceeding to so conclude. It is our opinion, therefore, that we cannot legally impose this modification as a condition to approval of Agreement No. T-3130.

The same holds true for the Presiding Officer's "modification" requiring the installation of additional piping and a crane at Terminal 1. While Tesoro had requested the imposition of such a requirement, and Anchorage has already agreed that if Agreements No. T-1685 and T-3130 are approved, it will make the necessary improvements at Terminal 1, there is no evidence that such improvements are necessary for approval. The Presiding Officer merely found that "it appears appropriate" that Agreement No. T-3130 be modified to require such improvements.

Similarly, the modifications relating to the Port Director's authority to suspend preferential rights for safety reasons and to order Tote to vacate Transit Area B after five days cannot legally be made conditions of approval. While such modifications might clarify the Port Director's authority there is no basis in this record to conclude that the Agreements without the modifications cannot be approved.

For the most part, the various modifications proposed by the Presiding Officer are basically the result of understandings reached by the parties during the proceeding. The fact that these accommodations were arrived at in this manner may explain the absence of any extensive discussion of these matters on the record. Nevertheless, there is no basis upon which the Commission may *impose* the modifications as a condition for approval.

To the extent, however, that these modifications reflect the understanding of the parties with regard to the future implementation of the agreements at issue herein, they should be filed for approval pursuant to section 15 before they are implemented. Accordingly, in order to provide the parties every opportunity to process a complete agreement we will withhold the issuance of our final order in this proceeding pending their submission.

Environmental Issues

The Commission's Office of Environmental Analysis (OEA) prepared a Threshold Assessment Survey (TAS) and reached the conclusion that the environmental issues relative to this proceeding did not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321, *et seq.* and that the preparation of a detailed environmental impact statement was not required under Section 4332(2)(C) of NEPA.

A notice of Environmental Negative Declaration was published in the *Federal Register* on May 3, 1976. Exceptions to the Declaration and basic TAS were filed by Anchorage, Sea-Land and Tesoro. We have examined

each of these exceptions, the OEA's response thereto, (Addendum to TAS) as well as the underlying TAS and conclude that there is nothing which would cause us to reverse the TAS's finding of environmental non-significance. Accordingly, we adopt the Environmental Negative Declaration prepared by OEA and make it a part of our decision herein. The TAS and the Addendum thereto are available for inspection on request to the Public Information Office, Room 11413, Federal Maritime Commission, 1100 L Street N.W., Washington, D. C. 20573.

CONCLUSION

Required Modifications

Agreement No. T–3130 is approvable subject to the parties submitting modifications requiring that Tote tie up its vessel at POL/Terminal 1 so as to leave available for the berthing of Coastal's Barge 201 a minimum of 125 feet measured from the northern boundary of Terminal 1. The modification should further provide that (1) if 125 feet is insufficient to berth simultaneously Tote's vessel at POL/Terminal 1, Coastal's Barge 201 at Terminals 1–2 and a Sea-Land vessel at Terminals 2–3, because of Sea-Land's inability to berth and off-load at Terminal 3 from a dockside point north of the southern boundary of Stevedore Building No. 2, then Tote will berth its vessel so that Coastal's Barge 201 may berth at Terminal 1 in space in excess of 125 feet provided that Tote's vessel does not have to move from its ramp locations and that the aft mooring line of Tote's vessel has a clear run to a safe ballard; and (2) immediately prior to arrival of Tote's vessel at the POL/Terminal 1, any vessel at Terminal 1 will vacate said Terminal in order to permit Tote's vessel to berth upon her arrival, except that Coastal's Barge 201 will not be required to cease discharging operations and vacate its berth, unless the Pilot and Captain of Tote's vessel determine that Coastal's Barge 201 must vacate in order to permit the safe docking of the vessel.

With respect to the preferential berthing of Tote's vessel "approximately one time per week," the parties are further required to modify Agreement No. T–3130 to specifically indicate that "approximately" means that Tote will be limited to one preferential call per week unless it is unable, by reason of weather conditions, an emergency to its scheduled vessel, or other conditions beyond its control, to make a preferential call at Anchorage during a given week. In that event, Tote will be permitted to double its preferential calls in a subsequent week or, in the alternative, employ a replacement vessel to make a scheduled preferential call without providing the 15 days' notice. The modification shall also provide that Tote will furnish Anchorage with prompt notice of its inability to make a preferential call as scheduled and its intent to either (1) double its call in a subsequent week, or (2) utilize a replacement vessel to make the weekly preferential call.

Agreement No. T–1685–6 is approvable if it is modified to require Sea-

Land to berth its vessels at Terminals 2 and 3 in such a manner as to leave 237 feet of the southern portion of Terminal 2 available for Coastal's use during such times as bulk cement discharging operations require barge utilization of the facilities at Terminal 2, with the understanding that such space shall be made available to the extent sufficient space is available at Terminal 3 for the berthing of Sea-Land vessels. The modification shall require Coastal to give reasonable notice to Sea-Land in advance to minimize any problem in connection with the cement barge.

In addition, as a condition for approval, both agreements shall be modified to indicate specifically whether tonnage fees assessed against Sea-Land and Tote upon completion of the stated number of preferential calls in their respective agreements will be at the rates set forth in Anchorage's tariff or at the rates specified in the agreements.

The Commission's approval is further conditioned on the required modifications to both agreements being submitted to the Commission within 30 days from the date of this Report.

Other Modifications

During the 30-day period, the parties are also asked to submit any further amendments reflecting various accommodations reached among themselves during the proceeding. We intend to notice any amendments in the *Federal Register* and allow interested persons to comment thereon. Our final order with respect to both agreements will be held in abeyance pending submission of the required modifications and review of any additional amendments presented.

Vice Chairman Clarence Morse, concurring and dissenting.

I do not agree that the back-up leases are not subject to section 15. Considering the geographical limitations of the port and the absolute necessity for container and Ro/Ro carriers to have container yards, etc., it is not conceivable that we lack subject matter jurisdiction. The leases involve ongoing relationships between Anchorage and the carriers for the sole purpose (as stated in each lease) of providing indispensable facilities for the conduct of ocean carrier operations. Also, the carriers will have preferential rights to the piers, thereby making their leases similarly restrictive of competition.

Consequently, in view of the need for prompt action by the Commission, I would grant interim approval to the back-up leases pending further proceedings.

In all other respects I concur.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-55

PETITION FOR DECLARATORY ORDER OF MATSON NAVIGATION COMPANY

ORDER

January 7, 1977

Matson Navigation Company (Matson), a common carrier by water in interstate commerce subject to the Shipping Act, 1916, has petitioned the Commission for a Declaratory Order pursuant to 46 C.F.R. 502.68.[1] The Petition was noticed in the *Federal Register* on October 8, 1976, and Replies were received from the Military Sealift Command, Department of the Navy (MSC) and the Commission's Bureau of Hearing Counsel (Hearing Counsel).[2]

The Petition seeks authority for Matson to capitalize the cost of monies used to acquire a new "071" containership now under construction at Bath Iron Works Corporation.[3] This cost would include net interest paid on borrowed funds (actual interest) *and* income foregone as a result of using existing company funds (foregone interest).[4] Matson also requests the Commission to state that such capitalized interest will be recognized as part of Matson's vessel investment account in all rate making proceedings involving the new "071" vessel *and* future vessels constructed by Matson. In support of this request, Matson states that the maintenance of an "Allowance For Funds Used During Construction" account and the inclusion of interest paid on capital investment funds during construction in a carrier's rate base is consistent with the public utility rate making practices of the Federal Power Commission and many state agencies regulating electric, gas, water and telephone companies. Matson also finds support in certain practices of the Maritime Administration, United States Department of Commerce (MARAD). No information is provided as to why Matson's "071" project differs from other vessel

[1] "Petition of Matson Navigation Company for Issuance of a Declaratory Order Authorizing Capitalization of Funds Used During Vessel Construction" (Petition).

[2] Matson has submitted a Reply to MSC's Reply, a pleading not permitted under the Commission's Rules of Practice and Procedure (46 C.F.R. 502.74).

[3] The first of 27 monthly progress payments was made on April 1, 1976.

[4] Matson wishes the Commission to "defer ruling" on whether it should be allowed to capitalize income foregone on funds derived from deferred federal income taxes.

acquisitions or why this question could not better be resolved by industry wide rule making or case-by-case adjudication.

MSC opposes the issuance of a Declaratory Order and states that Matson's propositions should be examined in one of the Commission's current investigations into Matson rate increases (Docket Nos. 73–22, 75–57 and 76–43). In any event, MSC opposes the capitalization of foregone interest. It also believes Matson should not capitalize actual interest expense until it divulges how it would treat such interest for federal income tax purposes. MSC requests an evidentiary hearing if the Commission were to consider the Petition on the merits.

Hearing Counsel argue that the instant proposal entails too many variables for the Commission to grant a *carte blanche* authorization to capitalize either actual interest or foregone interest. They claim a carrier has numerous options in financing ship construction, all of which can significantly affect its operating results, and that it would be impossible to assess Matson's proposal without first determining the affects of such an authorization on Matson's actual operations. Hearing Counsel also states that the Commission should expressly rule on the propriety of capitalizing interest foregone on funds derived from deferred federal income taxes if Matson's request were to be treated on the merits.

The Petition presents involved questions of policy and fact which are not effectively treated by the issuance of a Declaratory Order and shall therefore be denied. Matson does not request the resolution of a particular controversy or uncertainty arising from past Commission actions, or even allege that a controversy exists. Instead, Matson desires a personal exemption from the Commission's ordinary approach to rate base valuation. Before a conclusion could be reached on such a "Petition for Special Relief," it would be necessary to closely examine the carrier's financial position and rate structure. Matson has furnished us with no public interest reasons for conducting such an examination at this time.

The accounting regulations of the Federal Maritime Commission are not in issue here.[5] Indeed, the Commission does not require carriers to maintain particular types of accounts or an uniform accounting system. General Order 5 (46 C.F.R. Part 511) and General Order 11 (46 C.F.R. Part 512) provide only that carriers using the uniform system of accounts prescribed by MARAD must file annual financial reports based upon the MARAD system.[6] A carrier employing a different accounting system must thoroughly describe that system to the Commission. Whether the capitalization of interest expended for vessel construction reflects "gen-

[5] The two regulations cited in Matson's Petition are those of the MARAD, an agency which requires subsidized carriers to adhere to an uniform accounting system. The first, 46 C.F.R. 282.1(359), provides for the maintenance of a Construction Work in Progress account showing "all payments incident to the costs of vessels . . . in process of construction which are capitalized in accordance with generally accepted accounting procedures." The second, 46 C.F.R. 284.2(b), requires the capitalization of interest incurred during periods of construction (borrowed funds only, less interest earned thereon) for the purpose of paying operating differential subsidies in those relatively rare situations where MARAD permits carriers to recapture capital investment.

[6] 46 C.F.R. 511.15 and 512.7.

erally accepted accounting procedures" within the meaning of 46 C.F.R. Part 282.1(359) is a matter for MARAD to determine.

Accounts or accounting methods acceptable to MARAD may be filed with us. Our General Order 5 and 11 regulations do not state whether interest expenditures incurred during vessel construction should be capitalized or whether Interest During Construction Accounts should be maintained.[7] The annual financial reports merely guide the Commission's staff in its regulatory responsibilities and do not themselves establish the validity of any revenue account, vessel investment account or total rate base calculation. Our major concern is that the methodology employed in preparing the reports (including interest capitalization practices) be plainly identified.

Reasonable rates are determined by establishing a fair rate of return on the fair value of the carrier's property devoted to public service. This return on rate base should be sufficient to cover operating expenses *and* the cost of attracting capital. It would affect the determination of Matson's "fair rate of return" in pending Commission dockets were we to separately decide whether it may capitalize interest expenses for funds used to construct the "071" containership. If Matson wishes to pursue the issues connected with interest capitalization, it should do so on the complete record being compiled in the present adjudicatory proceedings.

Accordingly, IT IS ORDERED, That the "Petition of Matson Navigation Company for Issuance of a Declaratory Order Authorizing Capitalization of the Cost of Funds Used During Vessel Construction" is DENIED.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[7] The Commission has accepted annual financial reports which included entities for capitalized interest on borrowed capital and those which did not.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-1

CSC INTERNATIONAL, INC.

v.

ORIENT OVERSEAS CONTAINER LINE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

January 5, 1977

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 5, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76–1

CSC INTERNATIONAL, INC.

v.

ORIENT OVERSEAS CONTAINER LINE, INC.

December 13, 1976

ERRATA

Initial Decision on Remand served December 9, 1976.
Page 3—Line 13, change "evicence" to "evidence."
Page 8—Line 21, delete "16 SRR 1575."
Page 8—Line 29, add "16 SRR 1575."

(S) WILLIAM BEASLEY HARRIS,
Administrative law Judge.

FEDERAL MARITIME COMMISSION

No. 76–1

CSC INTERNATIONAL, INC.

v.

ORIENT OVERSEAS CONTAINER LINE, INC.

Reparation denied.

From the record in this case, the description of the complainant's product—Trimet—a resin raw material, rather than a synthetic resin itself, is properly any of the following:

Trimet (complainant's trademark on polytrimethylolethane); or

Trimet, Technical Trimethylolethane; or

Technical Trimethylolethane (Trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions.

The claim for reparation is for alleged overcharge in violation of section 18(b)(3) of the Shipping Act, 1916, for transportation of goods from New York to Keelung under two Bills of Lading. B/L NYCT–56 dated December 21, 1973, and B/L NYCT–11 dated January 28, 1974, each was for the shipment of Trimet; however, it was described on B/L NYCT–56 (Exh. 1) as "Synthetic Resin" and on B/L NYCT–11 (Exh. 2) as "Chemicals NOI (Organic Chemicals) (Technical Trimethylolethane)." Under Rule 4 of the respondent's tariff the carrier must compare the commodity description on the bill of lading with the description on the shipper's Export Declaration. The description on B/L NYCT–56 compared with shipper's Export Declaration reflected a Schedule-B number 512–0917, which defines the cargo as "Synthetic Alcohols, chemically defined, Monohydric, NFC." The description on B/L NYCT–11 in comparison with shipper's Export Declaration—Trimethylolethane, checked in commodity description in Schedule-B number 512–0917 was specified. Respondent applied ocean freight rate of $91.25 W or M as covered by Item 575 of its tariff to B/L NYCT 56 "Alcohol N.O.S., not dangerous or hazardous." On B/L NYCT–11 respondent through clerical error applied ocean freight rate of $81.00 W or M, as covered by Item 2187 of its tariff "Chemicals, Organic, N.O.S." when correct assessment of Item 575 "Alcohols, N.O.S." $91.25 W or M should have been made. Under the circumstances of this case, Rule 4 of respondent's tariff was and should have been used to aid in testing what can *now* be proved *was actually shipped,* based on all the evidence. "Alcohol N.O.S., not dangerous or hazardous," Item 575 of tariff, seems to be proper. There is no overcharge but an undercharge which respondent should seek from claimant and keep Commission posted as to such endeavors.

It is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. The freight charges in this instance were collected on April 2, 1974, as to B/L NYCT–11 and on

July 2, 1974, as to B/L NYCT-56, at which time, respectively, the cause of action accrued.

The complaint seeking reparation was filed with the Commission on December 29, 1975, and is within the two year statutory period of section 22 of the Shipping Act, 1916.

William Levenstein for complainant.

Robert G. Jufer, a practitioner before the Commission, for respondent.

INITIAL DECISION ON REMAND OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE[1]

The Commission's July 12, 1976, remand of this proceeding to the Presiding Administrative Law Judge was for such action, including a hearing, as he deemed necessary (Order on Remand, p. 4). The prior proceedings in which the March 9, 1976, Initial Decision issued was conducted under the Shortened Procedure provided for in the Commission's Rules of Practice and Procedure, 46 CFR 502.151 et seq. The Presiding Administrative Law Judge deemed it best that this remand proceeding be given full hearing and briefing treatment.

PROCEDURAL BACKGROUND SINCE REMAND

Pursuant to Rule 6(d) of the Commission's Rules of Practice and Procedure, 46 CFR 502.94, notice was served July 14, 1976, for a prehearing conference to be held August 5, 1976. The respondent attended the August 5, 1976, prehearing conference, however, no one appeared for the complainant. The respondent moved for dismissal of the complaint (Prehearing Conference transcript, p. 5). The Presiding Administrative Law Judge took the motion under advisement, at the same time directing the respondent to reduce the motion to writing with reasons in support, a copy to the complainant. The respondent never submitted the motion in writing. The motion to dismiss the complaint was denied without prejudice (Notice served August 17, 1976). The respondent's request that a hearing in this proceeding be held within thirty (30) days was granted; hearings were scheduled to commence on September 2, 1976. (*Ibid.*)

Hearing in this remanded proceeding commenced and concluded in Washington, D. C., on September 2, 1976. The official stenographic transcript of testimony thereof consists of twenty-five (25) pages. One witness was presented. Four (4) exhibits were received in evidence, numbered 1, 2, 3 and 4.

In accordance with Rule 10(cc) of the Commission's Rules of Practice and Procedure, 46 CFR 502.169, the above-mentioned transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for facts and decision.

The parties at the hearing (Tr. 24) agreed to and adhered to a briefing schedule of an opening brief filed by the complainant on or before October 4, 1976; a reply brief filed by the respondent on or before

[1] This decision became the decision of the Commission January 5, 1977.

November 4, 1976; a closing brief filed by the complainant on or before November 22, 1976.

FACTS

From the record herein the Presiding Administrative Law Judge finds the following facts:

1. The complainant, CSC International, Inc. (CSC), is a Delaware corporation, located in New York, whose principal business is the manufacture and distribution of chemicals and chemical products. CSC alleges it has been subjected to payment of a freight rate for transportation, under two Bills of Lading, which is unjust and unreasonable and in violation of section 18(b)(3) of the Shipping Act, 1916, for which reparation is sought from the respondent.

2. The respondent, Orient Overseas Container Line, Inc. (OOCL), is a common carrier by water engaged in transportation of cargo between U.S. North Atlantic ports and ports in Taiwan and as such is subject to the provisions of the Shipping Act, 1916, as amended.

3. Under Bill of Lading No. NYTC–56 dated December 21, 1973, CSC shipped at New York on OOCL's vessel *SS Taeho* for transportation to Keelund "6 Pallets said to contain 220 bags Synthetic Resin of a gross weight of 11,165 pounds, measuring 354 cft." The goods were consigned to the order of Hua Nan Commercial Bank Ltd., Taipei, Taiwan (Exh. 1).

4. The respondent carrier, as to B/L NYCT–56, after comparing the shipper's commodity description thereon with the shipper's Export Declaration commodity description per the tariff Rule 4, applied Ocean Freight rate of $91.25 W or M as covered by Item 575 of its U.S. Atlantic and Gulf Ports/Far East Tariff—OOCL Tariff FMC 6, "Alcohol N.O.S., not dangerous or hazardous." The total freight paid by CSC was $807.56.

5. The respondent admits that the charges for the freight under B/L NYCT–56 were collected July 2, 1974 (Tr. 15, 16). The cause of action as to it accrued as of July 2, 1974.

6. Under Bill of Lading No. NYTC 11 dated January 28, 1974, CSC shipped at New York on OOCL's vessel *SS Oriental Leader* for transportation to Keelung "22 Pallets said to contain: 860 Bags Chemicals NOI (organic chemicals) (Technical Trimethylolethane)" of a gross weight of 43,645 pounds, measuring 1,299 cft. The goods were consigned to the order of the First Commercial Bank of Taiwan (Exh. 2).

7. The respondent carrier as to B/L NYCT–11, after comparing the shipper's commodity description thereon with the shipper's Export Declaration commodity description, per respondent's tariff Rule 4, through clerical error, applied Ocean Freight rate of $81.00 W or M, as covered by Item 2187 of the tariff "Chemicals Organic N.O.S." when correct assessment of Item 575 "Alcohol N.O.S." $91.25 W or M should have been made. The total freight paid by CSC was $2,630.48 + $211.29 Bunker S.C. equals $2,841.57.

8. The respondent admits that the charges for the freight under B/L NYCT–11 were collected April 2, 1974 (Tr. 15, 16). The cause of action as to it accrued as of April 2, 1974.

9. Synthetic resin is a polymer, produced by the chemical reaction of one or more monomers, which react together and form a molecular-weight product.

10. Trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions; the primary use of this material is a real material making polyester. Polyester will be a resin.

11. Trimet, a resin raw material (Tr. 10), rather than a synthetic resin itself (Tr. 11), is CSC's trademark on the polytrimethylolethane. The general process for using Trimet to make a polyester resin is, the polyhydric alcohol is combined in a certain molecular proportion with polycarboxylic acid and with other polyalcohols and with possibly monocarboxylic acid, heated together, the water reaction is removed and the product is the polyester.

DISCUSSION

The Commission's July 12, 1976, order remanded this proceeding to the Presiding Officer to issue supplemental findings and conclusions on:

1. When the cause of action accrued;

2. Whether the parties did apply, or if not, why the parties should not apply Rule 4 of the carrier's North Atlantic/Far East Tariff FMC–6; and

3. What is the proper description of complainant's product.

WHEN THE CAUSE OF ACTION ACCRUED

The respondent OOCL admits and concedes the claim for reparation, filed December 29, 1975,[2] as to each Bill of Lading, was filed within the two (2) year statutory period provided in section 22 of the Shipping Act, 1916 (Tr. 15, 16). Charges for the B/L NYTC–56, dated December 21, 1973, were collected July 2, 1974; and for B/L NYTC–11, dated January 28, 1974, charges were collected April 2, 1974. The Commission pointed out in its July 12, 1976, order remanding the proceeding, it is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or payment of freight charges, whichever is later. In this instance the payment of freight charges was later than the time of shipment of the goods, so the cause of action accrued when the charges were collected.

Whether the parties did apply, or if not, why the parties should not

[2] The jacket in this docket contains part of a wrapping, apparently that in which the complaint was mailed, showing a postmark of New York, N.Y., December 23, 1975. The complaint bears a stamp "Received December 29, 1975, Federal Maritime Commission" and a stamp "Received 1975, Dec. 30 P.M. 3:40 Federal Maritime Commission Office of the Secretary." The Commission noted in its July 12, 1976, Order on Remand that the March 9, 1976, Initial Decision stated the complaint was filed with the Commission on December 30, 1975, however, the date of receipt stamped on the complaint is December 29, 1975. Henceforth the first date of receipt stamped shall be regarded as the filing date.

apply Rule 4 of the carrier's North Atlantic/Far East Tariff FMC-6 (Rule 4 of the tariff in question provides, "Description of commodities on all copies of the Bill of Lading shall be verified by a comparison with the description on the corresponding shipper's export declaration which shall determine the rate to be applied."), CSC argues that since the respondent did not adduce any evidence on that question, CSC is in no position to comment on the effect of the application or nonapplication of that rule by the carrier (CSC's opening brief, p. 3). OOCL on the other hand, argues that under provisions of Rule 4 of OOCL Tariff FMC–6 the carrier must compare the shipper's commodity description in the bill of lading with the description in the shipper's Export Declaration. OOCL repeats at p. 3 of its brief its letter dated January 14, 1976, which was subsequently served January 22, 1976, as its answer to the complaint that "On B/L NYTC–56 shipper described cargo as "Synthetic Resin' however the U.S. Customs Export Declaration also prepared by the shipper reflected a Schedule B number 512–0917 which defines the cargo as 'Synthetic Alcohols, Chemically Defined, Monohydric, N.E.C.' We accordingly applied the ocean freight rate of $91.25 W or M as covered by Item 575, OOCL Tariff FMC–6 under description of 'Alcohol N.O.S., not dangerous or hazardous.' " And, that "On bill of lading NYTC–11 shipper described cargo as 'Chemicals, N.O.I. (organic chemicals) (Technical Trimethylolethane)' and the U.S. Customs Export Declaration reflected Schedule B number 512–0917, also upon checking commodity description 'Trimethylolethane' in Schedule B classification no. 512–0917 was specified. Through clerical error, Item 2187 covering 'Chemicals, Organic, N.O.S.' was assessed at $81.00 W or M when correct application would have resulted in assessment of $91.25 W or M rate of Item 575 'Alcohols, N.O.S.' "

OOCL argues that with the detailed information required on the Export Declaration and the penalty involved for intentionally stating false information thereon, OOCL feels that the application of Rule 4 of OOCL Tariff FMC–6 requiring the carrier to verify the bill of lading commodity description with the Shipper's Export Declaration and to assess charges based on such description would eliminate violations of section 18(b) of the Shipping Act, 1916.

CSC in giving its views in general on such rules as Rule 4, contends the carrier's bill of lading is the contract of affreightment; that the export declaration is prepared for a reason other than the transportation transaction between the shipper and carrier, and that there is no authority to use Export Declarations as extensions of the bill of lading. CSC argues it is really immaterial that the bill of lading description and the Export Declaration description are the same or different and separate. And, CSC says further that Rule 4 gives the carrier the possible right to assess charges on a commodity it did not in fact carry without requiring any inquiry when there is a difference between the bill of lading description and the Export Declaration description. (CSC opening brief, p. 4).

While CSC argues the respondent adduced no evidence on the second question on remand, the record herein shows that the respondent early on showed comparison had been made by it with the Export Declaration of CSC and the bills of lading as evidenced by OOCL's letter of January 14, 1976, and the Answer to the Complaint. At no time did the complainant dispute the comparison and the results thereof. Unfortunately neither the complainant nor the respondent submitted or offered for receipt in evidence the Export Declaration. Perhaps CSC did not want the Export Declaration in this record, since CSC argues there is no authority to use Export Declarations as extensions of the bill of lading. CSC well may be right if the use of the Export Declaration was an extension of the bill of lading. The use as described in the Tariff's Rule 4 is not an extension of the bill of lading, but a check and balance similar to the checks and balances the various branches of Government exercise under the U.S. Constitution. 16 SRR 1575.

It seems that some check and balance is desirable, especially in this age of containerization and "the test is what claimant can now proved based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. . . ." (See *Kraft Foods v. Moore McCormack Lines, Inc.*, Docket No. 73–44, Commission Report on Remand served November 24, 1976).

The Presiding Administrative Law Judge finds and concludes for the above reasons that the respondent did apply and should have applied to the shipments in question Rule 4 of its tariff. The application of said Rule 4 seems to have conformed with its provisions.

THE PROPER DESCRIPTION OF COMPLAINANT'S PRODUCT

CSC says, "The evidence in this case is clear and uncontroverted. Trimet (complainant's trade name for Trimethylolethane) is used to make polyester, a synthetic resin, and is a resin raw material." (CSC's opening brief, p. 4)

According to CSC the freight rate as to B/L NYTC–56 assessed by OOCL was $91.25 per 50 cft at an undesignated tariff provision which covers presumably movements classified as Chemicals N.O.S. under the Far East/North Atlantic Port Tariff of OOCL." The total freight paid by CSC was $807.56.

CSC claims the shipment should have been described on B/L NYCT–56 as 5 (B/L says 6) pallets said to contain 220 Bags Synthetic Resin (Technical Trimet) and rated $71.50 per 2000 lbs. as per the provision for Synthetic Resin compound or powder, non-hazardous, N.O.S. Synthetic Resin in raw material form, for a total freight of $399.15. CSC's overcharge claim is derived from the $807.56 paid as freight charges July 2, 1974, subtracting $399.15 which CSC claims as the correct freight

charge, which leaves $408.41 for which CSC seeks reparation as to B/L No. NYCT-56.

According to CSC the freight rate assessed as to B/L NYCT-11, by OOCL was "$81.00 per 40 cft as per provision for Chemicals NOI under the North Atlantic Far East Tariff of OOCL" (This is Item 2187, 11th Rev. Page 83, effective January 15, 1974, of Orient overseas Container Line, Tariff Far East/North Atlantic Ports, FMC 6—Chemicals organic NOS (not hazardous or dangerous) W/M to Keelung $81.00). The total freight paid by CSC was $2,630.48 + $211.29 Bunker S/C = $2,841.57.

CSC claims the shipment should have been described on B/L NYTC-11 as 22 pallets said to contain 860 bags Synthetic Resin N.O.S. (Technical Trimet) and rated as $71.50 per 2000 lbs., as per the provision for Synthetic Resin, compound or powder, non-hazardous, N.O.S. Synthetic Resin in raw material form of the OOCL North Atlantic/Far East Tariff, for a total freight of $1,560.31 + $141.85 Bunker S/C = $1,702.16. CSC's overcharge claim is derived by subtracting from the $2,841.57 paid April 2, 1974, $1,702.16 leaving $1,139.41, for which CSC seeks reparation as to B/L NYCT-11.

OOCL argues that Technical Trimet (CSC's trade name for Trimethylolethane) described by CSC as "Trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions" and it is a raw material used in the manufacture of these synthetic resins, rather than a synthetic resin itself, is not a synthetic resin. OOCL contends that trimethylolethane is not defined in the Chemical Dictionary as a Synthetic Resin; that CSC in its complaint herein defines Technical Trimet as the raw material base for polyester and alkyd resins. OOCL also quotes from CSC's brochure (attachment 4 to complaint) "Trimet, technical is used also in other areas such as synthetic lubricants, oil-modified polymethanes, plasticizers and in organic synthesis." OOCL contends that Technical Trimet is a chemical or component part of synthetic resin as well as a component used in manufacture of other products (OOCL brief, p. 7).

CSC presented the only witness in this proceeding, Dr. Philip J. Baker, Jr., a holder of a PH.D degree in organic chemistry, who was originally hired in the research department of CSC in September of 1940 and worked in the Research and Development Division for 25 years, then transferred to his present employment in the technical staff of the Corporate Marketing Services, Inc., Chemical Group, Incorporated, Terre Haute, Indiana (Tr. 7, 8). Dr. Baker defined trimethylolethane as a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions, whose principal use is a real material making polyesters (Tr. 9), a resin. Trimet, CSC's tradename on polytrimethylolethane, a resin raw material, rather than a synthetic resin itself (Tr. 11), is used to make a polyester resin. In the general process for using Trimet to make a polyester resin, the polyhydric alcohol is combined in a certain molecular proportion with polycarboxylic acid and with other poly

alcohols and with possibly monocarboxylic acid, heated together, the water reaction is removed and the product is the polyester (Tr. 10).

The Presiding Administrative Law Judge finds and concludes from the record in this case that the proper description of complainant's product is:

Trimet—its registered tradename, or
Trimet, Technical Trimethylolethane, or
Technical Trimethylolethane

Trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions. It and Trimet are resin raw materials rather than a synthetic resin itself, combined in a certain molecular proportion with polycarboxylic acid and with other poly alcohols, heated together, the water reaction removed and the product is the polyester.

CSC in its Reply Brief (Closing Brief) argues, the evidence shows, and the respondent concedes, that the product is a synthetic resin raw material. CSC does not point to where in this record OOCL has made such a concession. OOCL disputes that the commodity shipped is a synthetic resin saying the commodity is merely a product which is used in the manufacture of synthetic resin as well as other products.

CSC argues that respondent's tariff provides a rate for "Resin, Synthetic" and that the "Note" in Item 1650 (sic) (Exh. 3 refers to Item No. 7650) of the tariff states that that description and rate refers "only to the raw material." And, that the product is such a raw material. (*Ibid*, p. 2). On the other hand OOCL says regarding application of this notation that CSC has changed the meaning by quoting OOCL's tariff out of context "As used in this item, synthetic resin refers only to the raw material." OOCL says when reading this notation it must be considered in its entirety, and that "raw material" must be interpreted as synthetic resin material still in its original state, before processing or manufacture and does not refer to the components or ingredients of synthetic resin. (OOCL Brief, p. 8).

OOCL argues that on B/L No. NYTC–56 (Exh. 1) the shipper described the cargo as "Synthetic Resin." However, the Export Declaration also prepared by the shipper reflected a Schedule B number 512–0917 which defines the cargo as "Synthetic Alcohols, Chemically Defined, Monohydric, N.E.C.," that OOCL applied the ocean freight rate of $91.25 W or M as covered by Item 575, OOCL Tariff FMC–6 under description of "Alcohol, N.O.S., not dangerous or hazardous. On B/L NYTC–11 (Exh. 2) the shipper described the cargo as "Chemicals N.O.I. (Organic Chemicals) (Technical Trimenthylolethane)." However, the Export Declaration reflected Schedule B number 512–0917. OOCL says through clerical error, Item 2187 covering "Chemicals, Organic, N.O.S." was assessed at $81.00 W or M when correct application would have resulted in assessment of $91.25 W or M rate of Item 575 "Alcohols, N.O.S."

CSC proposed as finding of fact No. 6 (opening brief, p. 2), "At the time these shipments moved the respondent's tariff, Orient Overseas Container Line Tariff FMC–6, published in Item 1650 (sic) (Item 1650 refers to Brooms corn) a rate of $48.50 for the December 21, 1973, shipment and $55 W for the January 28, 1974, shipment on 'Resin, Synthetic.' Bunker surcharges of $2 and $6.50 per ton respectively are provided on 3rd Rev. Page 1A and 4th Rev. Page 1–A, respectively." (Exh. 3 is a copy of OOCL's tariff 6th Rev. Page 133–A effective June 1, 1973, covering Item No. 7650) CSC contends that from the evidence and the tariff, the proper charges should be computed as follows:

B/L NYTC–56—11,165 pounds at $48.50 per 2000 pounds plus $2 per 2000 pounds = $281.70. Paid $807.56. Should be $281.70. Carrier paid $525.86.

B/L NYTC–11—43,645 pounds at $55 per 2000 pounds plus $6.50 per 2000 pounds = $1,341.93. Paid $2,841.57. Should be $1,341.93. Carrier paid $1,499.64. Total amount overpaid $2,025.50.

The Presiding Administrative Law Judge upon consideration of the above, *finds* and *concludes* that he agrees with OOCL's contention that Trimet is an ingredient of synthetic resin; and is not raw material that OOCL's tariff Item 7650 contemplates and CSC would have applied. As Dr. Baker testified, Trimet is a resin raw material rather than a synthetic resin itself. The description stated to be on the Export Declaration of Synthetic Alcohols and the testimony that trimethylolethane is a trifunctional polyhydric alcohol with all of the hydroxic groups being primary alcohol functions does not compare favorably with the B/L NYTC–56 (Exh. 1) description of the goods as synthetic resin, and seems to justify the application by OOCL of the ocean freight rate of $91.25 W or M as covered by Item 575 of the tariff in question, under "Alcohol, N.O.S., not dangerous or hazardous." Thus it is concluded as to B/L NYTC–56 there should be no reparation.

The Presiding Administrative Law Judge also is in agreement with OOCL that the same Item 575 of the tariff should have been applied to B/L NYTC–11 (Exh. 2). OOCL asserts Item 2187 was applied through clerical error. Application of Item 575 would be a revision upward, the shipper having paid less under Item 2187 then Item 575 of the tariff requires. However, the carrier must pursue collection of the undercharge other than in the Commission. At the same time the carrier must report to the Commission what steps it takes to collect the undercharge and the results thereof.

FINDINGS AND CONCLUSIONS

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds and concludes,* in addition to the findings and conclusions hereinbefore stated, that,

CSC is not entitled to an award of reparation, and its request for reparation should be denied.

Wherefore, it is ordered, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that,

(A) CSC's claim for reparation be and hereby is denied.

(B) OOCL shall promptly and fully inform and advise the Commission of the receipt or non-receipt of payments due it by virtue of the undercharge herein, and, if necessary, shall pursue to collect the same in the appropriate legal form again keeping the Commission promptly and fully advised so that OOCL and the Commission can meet the on-going responsibility imposed by the Shipping Act, 1916.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 9, 1976.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-40

PUBLICATION OF DISCRIMINATORY RATES IN THE U. S. NORTH ATLANTIC/CONTINENTAL EUROPEAN TRADE

ORDER OF DISCONTINUANCE

January 10, 1977

This proceeding was instituted in August, 1972, by order to show cause for the purpose of eliminating inbound/outbound ocean rate disparities in the U. S. North Atlantic/Continental European trade. Pursuant to subsequently adopted procedures many of the items of alleged disparity were eliminated from the proceeding either through rate changes by conference respondents or by satisfactory demonstration that no meaningful disparity existed. However, in spite of the length of time these procedures have been followed the proceeding has not been concluded as to all items of disparity.

Considering the length of time since institution of this proceeding and the very real possibility that subsequent rate actions have either eroded previous remedial rate actions, created new disparities on other items or eliminated disparities, it appears that continuation of this proceeding in its present posture would serve little useful purpose. We have reexamined our approach to the disparity problem and have determined that other approaches should be used whereby meaningful disparities can be identified and eliminated.

Accordingly, it is ordered that proceedings in this matter are hereby discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-16

MSA INTERNATIONAL

v.

CHILEAN LINE

Reparation awarded

William Levenstein for the Complainant.

Roger Quinones for the Respondent.

REPORT

January 13, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This proceeding is before the Commission on exceptions filed by Complainant, MSA International to the Initial Decision of Administrative Law Judge Charles E. Morgan denying reparation for alleged freight overcharges by the Respondent, Chilean Line, on three shipments of mine safety hats carried by Respondent from New York to Antofogasta under bill of lading dated November 1, 1974, and from New York to Valparaiso under bills of lading dated Jaunary 13 and January 23, 1975, respectively.

The three shipments, described in the shipping documents as "safety hats," "Topgard hats," and "V-Gard caps," respectively, were assessed the Class 1 rate of $153.75 per metric ton applicable to "Hats, N.O.S." Aggregate freight charges amounted to $4,869.64.

Complainant contends that the safety hats were protective head coverings for miners and should have been classified as "Helmets N.O.S." for which Respondent's tariff provided a class 7 rate of $130.00 per metric ton[1] and that by collecting charges in excess of those provided in the applicable tariff Respondent violated section 18(b)(3) of the Shipping Act, 1916 (the Act).

[1] Ninth Rev. page 166 of the Atlantic and Gulf/West Coast of South America Conference Freight Tariff FMC No. 1.

Respondent denies it had rated the shipments incorrectly and points to a dictionary definition which in describing "safety hats" makes no reference to helmets.

The Presiding Officer reviewed the descriptions of the goods in the shipping documents and concluded that the great preponderance of the evidence showed that the shipment consisted of safety hats. He accordingly dismissed the complaint.

While there is no doubt that the articles shipped were safety hats, the question here is whether they should have been classified and rated as helmets. By dictionary definition, a hat is "a covering for the head . . .;" [2] a safety hat is "a hat of steel or similar material worn (as by miners or sandhogs) to protect the top of the head[3] . . ." and a helmet is described as "any of the various protective head coverings made of hard material . . . to resist impact." [4] Thus, as distinguished from hats, described simply as head coverings, safety hats and helmets share the common characteristic of being *protective* head coverings made of materials capable of resisting impact to avoid injury to the wearer.

Mine Safety Applicances Company the shipper, describes its Topgard hats and V-Gard caps as "Rugged, economical head protection" "Built for use . . . [in] industries where protection from falling objects or overhead hazards is necessary." This illustrates the purpose for which these safety hats were to be used.

A reasonable reading and comparison of these definitions and descriptions lead us to conclude that, for tariff purposes, these safety hats are more akin to helmets than to hats and should have been classified and rated as helmets. By failing to so classify and rate the shipments and by assessing the rate applicable to Hats, N.O.S., Respondent violated section 18(b)(3)of the Shipping Act, 1916.

In light of the foregoing, the Initial Decision in this proceeding is hereby reversed and Complainant is awarded reparation in the amount of $752.22, which represents the difference between freight based on the rates applicable to Hats, N.O.S. and Helmets, N.O.S.

No interest on that amount is awarded as the carrier's misclassification of the cargo was due to a great extent to the shipper's failure to properly describe its product in the shipping documents prepared by it or by its agents on its behalf.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] Webster New World Dictionary, p. 640 (1970).
[3] Webster International Dictionary Unabridged, p. 1998 (1964).
[4] *Idem*, p. 1052.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-44

E.S.B. INCORPORATED

v.

MOORE MCCORMACK LINES, INC.

ADOPTION OF INITIAL DECISION

January 17, 1977

This proceeding is before the Commission on exception from Complainant, E.S.B. Incorporated, to the Initial Decision of Administrative Law Judge William Beasley Harris in which he determined that Respondent Moore McCormack Lines, Inc., had not violated section 18(b)(3) of the Shipping Act 1916, by collecting freight charges in excess of those provided in its tariff for the transportation of synthetic resin from Philadelphia to Santos, Brazil. No reply to the exception was received.

Complainant excepts to (1) the denial of its motion for judgment on the pleading and (2) the denial of reparation.

After a careful examination of the record, we concur with the Presiding Officer's findings and ultimate conclusions, and adopt his Initial Decision subject to the discussion below.

As to Complainant's first contention on exception, the record shows that the complaint was served on Respondent by mail on October 29, 1975. The Commission's cover letter, although stating that Complainant had requested the shortened procedure provided in Rule 11 (46 C.F.R. 502.181) of the Commission's Rules of Practice and Procedure (the Rules), referred by error to the "informal procedure" under which the answer to the complaint should be filed. In reply, Respondent filed an affidavit received by the Commission on November 20, 1975, consenting to the informal procedure under Subpart S of the Rules (46 C.F.R. 502.301).[1] As the amount claimed exceeded $5,000.00, the Presiding Officer advised Respondent by letter of November 21, 1975 that the informal procedure was inapplicable and that Complainant had requested the shortened procedure. This was a necessary clarification of the misunderstanding as

[1] Subpart S (46 C.F.R. 502.301, *et seq.*) of the Commission's Rules of Practice and Procedure provides for an informal proceeding conducted by a settlement officer for the adjudication of claims not in excess of $5,000.00.

to what procedure Respondent was asked to consent to. The Presiding Officer also urged Respondent to enter an appearance in the case. We consider this a grant of an extension of time for Respondent to state whether it consented to the shortened procedure and to answer the complaint. The Presiding Officer had such power under Rule 10(g) (§502.147), and once Respondent consented to the shortened procedure, Rule 5 was inapplicable so that permission from the Commission or the Chief Administrative Law Judge to grant the extension was unnecessary.[2]

By letter dated December 2, 1975, Respondent filed its answer to the complaint and consent to the shortened procedure which was received at the Commission on December 4, 1975, and thereafter, upon request from the Secretary, filed the additional number of copies required.

We have recognized, and courts have long held that "even when acting in quasi-judicial capacity, the strict rules which prevail in suits between private parties" and "the hard and fast rules as to pleadings which govern courts of law" do not apply to administrative proceedings where "inquiries should not be too narrowly constrained by technicalities." *Oakland Motor Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934).

As the Presiding Officer noted, Respondent was unaware of the procedural requirements, but when instructed how to proceed, Respondent did make what appears to be a good faith effort to comply with the Commission's rules. Moreover, the complaint here, alleging as it does a violation of the statute by the carrier, raises issues of fact which may not be resolved by default but must be properly established on the basis of all the evidence available. Under these circumstances we find that the Presiding Officer had the authority to grant an extension of time and did not act arbitrarily in accepting the filing of Respondent's answer.

Turning to the question of whether the Gaylord cartons in which the synthetic resin was packed, were crated in wood, Complainant contends that the Presiding Officer held the bills of lading to be the sole proof of the transaction between the parties, to the exclusion of all other evidence. The Commission has said in *Western Publishing Co. v. Hapag Lloyd, A.G.*, 13 S.R.R. 16 (1972), that even though the bill of lading sets forth the terms and conditions of the contract of affreightment, it is not conclusive as to the description of the goods shipped, so that a shipper who challenges that description, may introduce whatever evidence he has to prove his allegations as to what actually moved, even where the bills of lading and other shipping documents were prepared by the shipper or his agent. This the Presiding Officer recognized and although it appears that he took notice of the "various descriptions" of the cargo in all of the shipping documents introduced in evidence, the emphasis placed on the importance of the bill of lading could be misleading.

[2] Rule 11(i), 46 C.F.R. 502.183 reads in part: "If the respondent *does not consent* to the proceeding being conducted under the shortened procedure provided in this subpart, the matter will be governed by Subpart E of this part (Rule 5). . . ." (Emphasis added.)

Complainant relies principally on letters from the packers and on the annotation "wood box" on one of the packing lists to show that the cartons were in fact crated, and thus qualified for the lower rate claimed. The three letters from the Shipside Packing and Consolidation Co., Inc., all dated September 11, 1975, assert that the shipments of "Gaylord cartons were packed in wooden crates." There is no reference in these letters to any records prepared at the time the cartons were packaged, upon which the statements in the letters are based, or any mention of the date the packaging was done. Furthermore, Complainant did not answer Respondent's argument that had the cartons been crated, the measurements on the packing lists and those shown in the Shipside Company's letters and on the bills of lading could not have been identical. In its Reply to Respondent's answer Complainant merely states that the measurements on the bills of lading reflect those in the Shipside Company's letters.

Furthermore, Complainant's three packing lists, which bear the dates of June 21 and 28, 1974, and July 25, 1974, respectively,[3] describe the shipments as 40 "box"; 40 "wood box"; and 40 "Pallet Box." In none is there any mention of *crated* cartons or boxes.

Moreover, in referring to the photograph in the record showing a skidded Gaylord carton, Complainant states that "since this was a one-time order, no photograph of the completed crates were made." There is no explanation why this "one-time order" required special packaging.

In light of the foregoing and Complainant's failure to mention wood crating in *any* of the shipping documents prepared at the time of shipment, we agree with the Presiding Officer's finding that there is insufficient evidence to sustain the claim that the Gaylord cartons were in fact not only skidded but also externally crated on all sides. We therefore concur with the Presiding Officer's ultimate conclusion that Complainant has not met its burden of proof. Having so found, it is not necessary to decide whether packing in wooden crates would satisfy the tariff requirement for "in wooden cases," or whether the tariff is ambiguous in this respect.

Exceptions not specifically discussed have nevertheless been reviewed and found to be a reargument of contentions considered and properly disposed of by the Presiding Officer or to be without merit.

Accordingly, we adopt the Initial Decision, a copy of which is attached hereto and made a part hereof.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[3] The packing lists bear a stamp showing that they were received at Complainant's Traffic Department on the above dates. As evidenced by the bills of lading, the shipments were delivered to the carrier on September 20, 1974.

FEDERAL MARITIME COMMISSION

No. 75-44

E.S.B. INCORPORATED

v.

MOORE MCCORMACK LINES, INC.

Adopted January 17, 1977

Reparation denied

William Levenstein, for the Complainant.

John D. Straton, Jr., Respondent's Manager—Rates & Conferences, for the Respondent.

INITIAL DECISION OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE[1]

This is a complaint case in which the sum of $16,489.58 plus interest from the date of payment thereof is sought by E.S.B., Incorporated (E.S.B.) from Moore McCormack Lines, Inc. (McCormack) a common carrier by water in foreign commerce, as reparation for payment by E.S.B. to McCormack, of freight charges, allegedly in excess of those chargeable under Inter-American Freight Conference—Section A—Tariff No. 3 (FMC No. 7), in violation of Section 18(b)(3) of the Shipping Act, 1916, as amended, for transportation of three shipments of Synthetic Resin, under Bills of Lading dated September 20, 1974, on McCormack's vessel *Mormacrigel,* from Philadelphia, Pennsylvania to Santoz, Brazil.

This proceeding was conducted under the Shortened Procedure, Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181. The procedural background herein, is hereinafter set forth to aid in the understanding of what occurred in this instance, as well as to indicate upon what material the found facts are based for the findings and conclusions herein.

PROCEDURAL BACKGROUND

Counsel for E.S.B. signed the complaint herein dated and filed October 22, 1975. (Under Rule 8(b)(a) of the Commission's Rules of Practice and

[1] This decision became the decision of the Commission January 17, 1977.

Procedure, 46 CFR 502.112, the signing of the complaint by the attorney constitutes a certificate by him that he has read the pleading, document or paper; that he is authorized to file it; that to the best of his knowledge, information and belief there is good ground to support it; except when otherwise specifically provided by rule or statute, the pleading, document or paper so signed need not be verified or accompanied by affidavit.) Counsel attached to the complaint his verification, sworn to under date of October 24, 1975. The complaint was served October 29, 1975, and notice thereof was published in the Federal Register November 4, 1975, page 51224, Vol. 40, No. 213. The complaint (page 5) asked for application of "the Shortened Procedure, pursuant to the Commission's Rule 11."

The Respondent, McCormack, in a letter dated November 18, 1975 (received November 20, 1975) stated, "We enclose herewith our authorization for informal procedure by the Commission of the above cited subject." The said authorization, notorized, was "to determine the . . . claim in accordance with Subpart S (46 CFR 502) of the Commission's informal procedure for adjudication of small claims subject to discretionary Commission review." The Presiding Administrative Law Judge in a letter dated November 21, 1975, to the respondent, copy to all parties, pointed out the inconsistency of the authorization for the Small Claims procedure (Small Claims are for $5,000 or less (46 CFR 502.301)) when this claim is for $16,489.58, for which the complainant requested use of the Shortened Procedure, under Rule 11(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.181.

Those representing the parties telephoned the Presiding Administrative Law Judge on or about November 26, 1975, anent having received the letter aforementioned.

The Complainant on December 1, 1975, filed a motion, pursuant to Rule 5(d) of the Commission's Rules of Practice and Procedure, 46 CFR 502.64, for judgment on the pleadings, on the grounds that no answer to the complaint had been filed or served upon the complainant within twenty (20) days after October 29, 1975, the date of service of the Complaint. (Under Rule 11(c), 46 CFR 502.183, if the respondent consents to the shortened procedure, the answering memorandum of the respondent is to be served within twenty-five (25) days after date of service. In this instance, by November 24, 1975).

A letter, dated December 2, 1975, was received from the respondent December 4, 1975, stating, "With reference to your letter of November 21, 1975, and our telephone conversation of November 26, 1975, enclosed is our answering memorandum to the above complaint. The writer apologizes for any delay that may have been incurred." (Under the date of December 11, 1975, the Secretary of the Commission wrote to the respondent acknowledging receipt of the answer and requesting submission by the respondent of additional copies thereof as directed by 46 CFR 503.118.

On December 10, 1975, E.S.B. filed a memorandum in reply to

McCormack's answer in which E.S.B. renewed its motion for judgment on the pleadings; took issue with the answering memorandum, calling it "patently deficient in a number of respects"; also objected that the respondent did not request an extension of time to answer as provided in Rule 5(d), or had permission been granted to the filing of a delayed answer.

By order served December 11, 1975, E.S.B.'s motion and renewal thereof for judgment on the pleadings was denied by the Presiding Administrative Law Judge, the order stating *inter alia*, "In view of the above background it is deemed most inequitable to allow judgment on the pleadings. There is an apparent unawareness by the respondent of the Commission's Rules of Practice and Procedure, that could be interpreted as a somewhat cavalier approach to this serious claim for reparations. The held up answering memorandum indicates a willingness to proceed under the Shortened Procedure. . . . The complainant would have a strict application of rules to provide for the basis of recovery of $16,489.58, and he urges that there has been no extension of time granted to the respondent to answer. While this is technically true, the circumstances as related herein obviate a formal granting of extension of time to answer since fairness, and justness cry out for the respondent to be given opportunity to promptly set forth its defense."

On December 31, 1975, a copy of the respondent's answer was received by the Presiding Administrative Law Judge from which he deduced that the respondent was in compliance with the aforementioned December 11, 1975, letter of the Secretary of the Commission for additional copies.

The respondent's answering memorandum having indicated its willingness to proceed under the shortened procedure, as requested by E.S.B., approval to so proceed was granted by order served January 7, 1976, and the record closed for decision since E.S.B. had already filed its reply thereto December 10, 1975.

MATERIALS SUPPLIED BY THE PARTIES, AND CONSIDERED BY THE PRESIDING ADMINISTRATIVE LAW JUDGE IN FINDING THE FACTS HEREIN ON WHICH TO BASE THE DECISION

The Complainant submitted:

The complaint (6 pages) to which was attached:

1. Memorandum of Facts and Arguments (5 pages)
2. Copy of Bills of Lading No. 1, 2 and 15.
3. Copy of E.S.B.'s Packing List.
   (a) Dated June 21, 1974 as to E.S.B. Order No. TN-1-1530
   (b) Dated June 28, 1974 as to E.S.B. Order No.-TN-1531-1
   (c) Dated July 25, 1974 as to E.S.B. Order No. TN-1-15312c
4. Copies of 3 Invoice—Sight Drafts, all dated September 5, 1974 as to E.S.B. orders No. TN-1-1530, TN-1-1531-1 and TN-1-1531-2c
5. Copy of 3 Letters, all dated September 11, 1975, from Shipside Packing and

Consolidating Co., Re: packing as to E.S.B. Order Nos. TN-1-1530, TN-1-1531 and TN-1-1531-2c

6. A photograph of a "Gaylord Carton"

7. A copy of the 4th Revised Page 158-A, effective September 1, 1974, of Inter-American Freight

8. Complainant's Memorandum in Reply (8 pages)

The Respondent submitted:

Answering Memorandum to complaint (so identified in November 18, 1975 letter, but memorandum itself simply bears this Docket number (75-44) and the title of the case. The Answering Memorandum consists of 4 pages, to which is attached:

1. "History" (pages 5-7)
2. Copies of Shipper's Export Declaration
3. Copies of Bills of Lading No. 1, 2 and 15
4. Copies of E.S.B.'s Packing List
   (a) Dated June 21, 1974 as to E.S.B. Order No. TN-1-1530
   (b) Dated June 28, 1974 as to E.S.B. Order No. TN-1-1531-1
   (c) Dated July 25, 1974 as to E.S.B. Order No. TN-1-1531-2c
5. Copies of 3 Invoice—Sight Drafts, all dated September 5, 1974, as to E.S.B. Orders No. TN-1-1530, TN-1-1531-1 and TN-1-1531-2c
6. Copies of claims made on behalf of E.S.B. to McCormack by Ocean Freight Consultants (OFC) dated December 23, 1974, concerning the shipments involved.
7. Copies of correspondence of respondent with OFC
8. Copy of March 5, 1975, letter from E.S.B. to OFC
9. Copy of May 1, 1975, letter from OFC to McCormack

From these materials, the Presiding Administrative Law Judge finds the following facts:

FACTS

The Complainant, E.S.B., is a Delaware Corporation located in Philadelphia, Pennsylvania whose principal business is the marketing of batteries and battery products.

The Respondent, McCormack, is a common carrier by water engaged in the transportation of cargo between U.S. Atlantic Ports and Ports of Argentine, Uraguay and Brazil, including Santos, Brazil and, as such, subject to the Shipping Act, 1916.

McCormack is a member of the Inter-American Freight Conference, and at the times involved in this proceeding operated under Inter-American Freight Conference—Section A—Tariff No. 3 (FMC No. 7).

The parties agree that Synthetic Resins were shipped from Philadelphia, Pennsylvania to Santos, Brazil, under Bills of Lading number 1, 2 and 15 respectively, all dated September 20, 1974, on the respondent's vessel *Mormacrigel*. The parties also agree that the freight rate assessed was $125.00 per 40 cubic feet as per rate item 1, 4th Revised Page 158-A (effective September 1, 1974) of Inter-American Freight Conference—Section A—Tariff No. 3, (FMC No. 7); that the charge, including a bunker surcharge of $10.00 per 40 cubic feet and a port surcharge of 8% was $7,115.04 as to B/L # 1, $7,938.81 as to B/L # 2 and $8,492.85 as to B/L # 15, a total of $23,546.76 was paid by the complainant.

Fourth Revised page 158–A of the said tariff reads, in the part under which the freight rate was assessed:

Resin, Synthetic; sheets, plates, shapes or N.O.S. . . . Rate Basis W/M / Rate $125.00 / Rate Item 1 /

EXCEPTION: Resin, Synthetic, N.O.S., In Wooden cases or fibre or metal drums or in 20 ft. or in 40 ft. House to House containers. Rule 28 to apply.

Re: Bill of Lading No. 1:

B/L #1 shows the shipment measured 1952 cubic feet.

B/L #1, under export references refers to Order No. TN–1–1531–2c. The description of Order No. TN–1–1531–2c appears on the following documents as indicated:

Document	*Description*
B/L #1	"(40) Skidded Cartons: Synthetic Resin"
Export Declaration	"(40 Skidded Cartons: Synthetic Resin"
Dock Receipt	"(40) SKIDS Ctns—Synthetic Resin" (SKIDS is in lettering above the typing of the description)
Packing List dated July 25, 1974	"40 Box, 1000 lbs. each—Amoco Polypropylene" with dimensions in inches of 47 x 39 x 46.
OFC December 23, 1974 claim	would correct from "40 Skidded Cartons" to "Synthetic Resin Polypropylene packed in cartons." "Reason for correction: Cargo subject to special rate of $94.50/2240 as the Resin shipped consisted of Polypropylene indicated in this commercial Invoice."
Shipside Packing Co. letter dated September 11, 1975:	"40 Gaylord Cartons of impact resin were packed in wooden crates 46 x 39 x 46 inches. These crates were constructed with 1 x 6 yellow pine 7 inches apart with 3 x 4 inch skid each weighed 1188# gross lbs."

Re: Bill of Lading No. 2:

B/L #2 shows the shipment measured 2178 cubic feet.

B/L #2 under export references lists Order No. TN–1–1530. The description of Order No. TN–1–1530 appears on the following documents as indicated:

Document	*Description*
B/L #2	"(40) Skidded Cartons—Synthetic Resin"
Export Declaration	"40 Skidded Cartons—Synthetic Resin"
Document	*Description*
Dock Receipt dated September 9, 1974	"(40) SKIDS ctns—Synthetic Resin" (SKIDS is in lettering below the type of the description).
Packing List dated June 21, 1974:	"40 Wood Box, 1000 lbs. ea.—Amoco Polypropylene with dimensions in inches of 48 x 40 x 49.
OFC December 23, 1974, claim	would correct from "40 Skids (Pallets) Synthetic Resin" to "Resin Synthetic Polypropylene Packed in Cartons" "Reason for correction: Cargo subject to special rate of $92.50 per 2240 lbs. in Synthetic Resin consisting of polypropylene and should be rated accordingly."
Document	*Description*

Shipside Packing Co. letter, dated September 11, 1975:	"40 Gaylord cartons (sic) of impact resin were packed in wooden crates 48 x 40 x 49 inches. These crates were constructed with 1 x 6 inch yellow pine 7 inches apart with 3 x 3 x 4 inch skids each weighed 1160 gross lbs."

Re: Bill of Lading No. 15:

B/L #15 shows the shipment measured 2330 cubic feet.

B/L #15 under Export References lists Order No. TN-1-1531. The description of Order No. TN-1-1531 appears on the following documents as indicated:

B/L #15	"(40) Skidded Cartons—Synthetic Resin"
Export Declaration	"(40) Skidded Cartons—Synthetic Resins"
Dock Receipt	"(40) SKIDS Ctns—Synthetic Resin" (SKIDS is in lettering above the typing of the description)
Packing List dated June 28, 1974	"40 Pallet Box, 1000 lbs. ea. Amoco Polypropylene" with dimensions 51 x 42 x 47.
OFC December 23, 1974, claim	would correct from "40 Pallets Synthetic Resin" to "Synthetic Resin Polypropylene" "Reason for correction—Cargo subject to special rate of $92.50/2240 as it was palletized and packed in cartons."
Shipside Packing Co. letter dated September 11, 1975	"40 Gaylord cartons of impact resin were packed in wooden crates 51 x 42 x 47 inches. These crates were constructed with 1 x 6 yellow pine 7 inches apart with 3 x 4 inch skid each weighed 1222 gross lbs.

ISSUES

The complainant, admittedly, "trying to prove only that the cartons (as shown in the Bill of Lading) were enclosed in a crate/case, which packing has an applicable rate different from the rate applied" (Complainant's Memorandum in Reply p. 4), posed the question herein to be "whether the polypropylene resin packed in Gaylord Cartons which were crated and skidded is the sort of package which complies with the carrier's requirement for 'in wooden cases'." (Memo of Facts and Arguments attached to complaint, page II).

At the same time, the complainant contends that no alleged error in description is involved in this cause (Memorandum in Reply, p. 4).

The Respondent did not pose any issues. McCormack does assert the cargoes were correctly rated based on the Bill of Lading description and the packaging used. And, the Respondent mentioned Rule 3 of the tariff involved, to the effect, that claims for adjustment in Freight charges, if based on alleged error in description, weight and/or measurement, are not to be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier; that the shipments arrived in Santos, Brazil on October 14, 1974, and left the custody of the carrier before correction was sought and that the shipper did not write about the shipment until March 10, 1975, and that "Since March 10th, the cargoes packing has from 'Skidded Cartons' grown to alleged 'Skidded

Cartons Reinforced by Wood Crating' to alleged 'Skidded Cartons Crated' (implying Wood Crating on all sides, top and bottom) to, by synonym, 'Skidded Cases'."

The issue is, where there is no dispute the commodity shipped was Synthetic Resin which was delivered by the carrier as per the Bill of Lading, and after the shipment had left the custody of the carrier, the shipper asserts the packaging, not the description, of the commodity was otherwise than as stated in the bill of lading, the claimant, under the circumstances herein, has met its heavy ultimate burden of proof to establish his claim, to warrant finding the carrier in violation of Section 18(b)(3) of the Shipping Act, 1916, and subject to the paying of reparations to the shipper.

HOLDING

The claimant has failed to meet its heavy ultimate burden of proof that the carrier has violated the Shipping Act, 1916, and that the claimant is entitled to reparations. Reparation should be denied.

DISCUSSION

E.S.B. argues that the shipments involved consisted of polypropylene resin packed in Gaylord Cartons which were then crated and skidded (Argument P. II) for easy handling by both the shipper and the carrier (Ibid p. V).

McCormack argues the easy handling by the shipper, to avoid puncturing the "Gaylord" with fork lift equipment, would be, packing the 1000 pounds of synthetic resins into a skidded—internally reinforced—empty Gaylord container which when filled could easily be moved without fear of puncture (p. 5 answering memo); that the complainant erroneously assumes the claimed wooden reinforcement to be full external wood crating (p. 7) and that the complainant has failed to support external crating on all six sides of the carton, and has not supported beyond a reasonable doubt that external reinforcement existed (Ibid).

E.S.B. replied (Memorandum in reply, p. 6) "even if, as argued by respondent, the crating was internal (which seems incredible), the tariff requirements for 'in wooden cases' would be satisfied." E.S.B. thus pooh-poohs the idea of internal crating, but does not deny that such internal crating is possible. As to McCormack's contention that E.S.B. has not shown the cartons were crated on all six sides, E.S.B. answers that contention "is as wrong as all its (McCormack's) other arguments" (Ibid p. 7).

E.S.B. asserts the resin was packed in "Gaylord" cartons which were then crated and skidded and the tariff that should apply is also on 4th Revised Page 158(a) of the tariff at a rate of $92.50 per 2240 pounds for "Resin, Synthetic Viz: Polyethylene, Polypropylene or Polyvinylchloride, in wooden cases or fibre or metal drums or in 20 ft. or in 40 ft. House to

House containers." ("Rule 28 to apply" was omitted by E.S.B.). E.S.B. argues that the carrier does not define "wooden cases" in its tariff; that the crates were wooden is shown by the letters from the packers so that what remains is to show that a "crate" is a "case." E.S.B. then gives definitions of "case" and "crate" from Webster's Seventh New Collegiate Dictionary and from the Random House Dictionary, and argues that having shown the shipment moved crated that as a matter of law the rate for Resin, Synthetic, in wooden cases, is the only lawful rate applicable for these shipments (Argument p. V). E.S.B. argues further that under the Harter Act, 46 USCA 193, the Bill of Lading is that of the carrier, so that the carrier should not be heard to say that it did not know that the shipments moved in crates/cases.

In this instance, when the dispute arose, the cargo had left the custody of the carrier, having been delivered. Once there has been a proper delivery of cargo, the Harter Act no longer applies to the relationship of the parties. See *J. Kinderman & Sons v. Nippon Yusen Kaisha Lines,* 322 F Supp., 939, 941–942 (1971).

The Bill of Lading sets forth the contract between the shipper and the owner of the vessel, describing the merchandise by its quantity and markings, the names of the shipper and consignee, the place of departure and discharge the name of the master and vessel, and the price to be paid for transportation. Each bill of lading is a separate transaction, and the merits of each claim must be considered in toto and independent of claims under any other bill of lading. *Colgate Palmolive Co. v. The Grace Line,* Docket No. 194(I), dated March 18, 1974, pages 2–3. The burden of proving that the facts were otherwise than as stated in the bill of lading must be on the claimant in any proceeding. But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contention, the claimant has a heavy ultimate burden of proof to establish his claim. *Western Publishing Co. Inc. v. Hapag Lloyd, A.G.,* Docket No. 283(I), 13 SRR 16 (1972).

Looking at the bills of lading involved, the cargo is described on each as "(40) Skidded cartons—Synthetic Resin." E.S.B. would use the part of the *Western Publishing Co.* case, *supra,* which says "the description on the bill of lading should not be the single controlling factor in cases of this nature. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description."

An examination of the description of the cargo as shown for each bill of lading above under *Materials Supplied by the Parties* and *Facts,* shows the various descriptions of the cargo given or accepted by those representing the complainant at various stages, and tends to support the respondent's comment quoted above under *Issues,* and leaves unproved that the shipment was not properly rated.

The dock receipt, packing list, invoice, letters from packers and the documents submitted are neither contracts of affreightment nor necessar-

ily a delivery to ship, and as respects shipments in which bills of lading are issued, the "bill of lading" is as between shipowner and shipper, the statement of the contract between them. *The Capt Faure* 10 F.(2d) 950, 954, CA–2, (1926). The carrier has a right to expect the shipper will properly identify the shipment. *Ocean Freight Consultants Inc. v. Italpacific Line,* Docket No. 71–81, 15 FMC 314, 319 (1972). The shipper in this instance has not justified changing the description of the bill of lading.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in these proceedings, the Presiding Administrative Law Judge *finds* and *concludes,* in addition to the findings and conclusions hereinbefore stated:

1. Complainant has failed to meet heavy burden of proof that respondent has violated Section 18(b)(3) of the Act.
2. Reparation should be denied.

Wherefore, it is *ordered,* subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that

(A) E.S.B.'s claim for reparation be and hereby is denied.

(B) The proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
January 26, 1976.

FEDERAL MARITIME COMMISSION

No. 76-26

TRANSCONEX INC.—PROPOSED GENERAL RATE INCREASE IN THE VIRGIN ISLANDS DOMESTIC OFFSHORE TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

January 12, 1977

Notice is hereby given that the Commission on January 12, 1977, determined not to review the order of the Administrative Law Judge in this proceeding served December 15, 1976, finding respondent's rate increase not unjust or unreasonable and discontinuing the proceeding.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 76–26

TRANSCONEX INC.—PROPOSED GENERAL RATE INCREASE IN THE VIRGIN ISLANDS DOMESTIC OFFSHORE TRADE

PRESIDING ADMINISTRATIVE LAW JUDGE ORDER (1) FINDING RATE INCREASE NOT UNJUST OR UNREASONABLE (2) DISCONTINUING PROCEEDING

December 15, 1976

Revised tariff pages[1] filed in April 1976 by Transconex, Inc. (Transconex), in its Virgin Island trade reflecting a general rate increase (this increase did not affect the rates on commodities moving in the Puerto Rico trade. Exh. 1, p. 2) of 12 percent went into effect soon after the Commission's June 3, 1976, Order (published in the *Federal Register* June 9, 1976, page 23228, Vol. 41, No. 112) lifted the suspension imposed by the Commission's Order of Investigation and Suspension herein, served May 11, 1976 (published in the *Federal Register* May 14, 1976, Page 20016, Vol. 41, No. 95). Those increased rates are still in effect, under a filing by Transconex of a new tariff FMC–F No. 2, which became effective on August 21, 1976. Although this new tariff cancels FMC–F No. 1, there is no change in rates applicable to commodities transported in the Virgin Islands trade (Exh. 1, p. 2). And, the May 11, 1976, Commission Order of Investigation and Suspension provides (p. 2): "In the event the tariff matter is further changed, amended, or reissued, such changes are hereby ordered to be included in this investigation;".

Transconex, the named respondent herein, is a non-vessel operating common carrier (NVOCC) by water in the domestic offshore trade

[1] Transconex's Ocean Freight Tariff FMC–F No. 1.

14th Revised page 15.
9th Revised page 24.
11th Revised page 25.
12th Revised page 25.
10th Revised page 26.
11th Revised page 27.
11th Revised page 37.
12th Revised page 38.
13th Revised page 38.
12th Revised page 39.
12th Revised page 40.

between Miami and Jacksonville, Florida, on the one hand, and, on the other, Puerto Rico and the Virgin Islands.

The Commission, pursuant to section 18(a) and 22 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Act, 1933, directed, by its May 11, 1976, Order of Investigation and Suspension, this investigation into the lawfulness of the above-mentioned revised tariff pages.

Transconex points out the rate increases are not opposed by any shipper, consignee, other person (Exh. 2, p. 2). It is the position of Transconex that the testimony on behalf of Transconex, as well as the testimony submitted by Hearing Counsel, considered by the criterion of operating ratio, as well as the criterion of rate of return on rate base show the rate increases under investigation are reasonable and should be permitted to remain in effect (Exh. 2, p. 4).

Hearing Counsel took the position (Hearing Counsel's Statement of Applicable Legal Principles and Notice of Proposed Witnesses, served July 12, 1976) that its approach in testing the reasonableness of Transconex's rate increases in this proceeding is not confined to any single standard but will be based on a number of criteria. . . . (p. 5)

Witness Thomas J. Stilling, an economist with the Commission's Bureau of Industry Economics, in his testimony (Exh. 3), points out the operating ratio is a poor measure of a company's financial well-being (p. 4) and gives little insight into the profitability of an enterprise and therefore the reasonableness of rate levels (p. 3); that when a company has invested a non-negligible amount of capital, rate of return on rate base and an owner's equity are more appropriate measures to employ when determining the fairness of rates (p. 4).

Witness Larry E. Walker, a staff accountant with the Commission's Bureau of Industry Economics, Office of Financial Analysis, reviewed the various accounting data provided by Transconex and related companies (Exh. 4, p. 1) and compared these results with rates of return being earned by other companies which are comparable in terms of risk. One industry which he found has many of the same characteristics as NVOCC's is the motor carrier industry; another industry which is similar is the domestic freight forwarding industry, which is regulated by the Interstate Commerce Commission (ICC). The witness concludes that Transconex should be in the highest rate of return bracket if it is to continue to be able to attract capital at reasonable rates. The witness showed the freight forwarding industry, regulated by the ICC, averaged a rate of return of 24.14 percent from 1965–1974, as part of his analysis. In the witness' judgment a 26.27 percent rate of return on rate base is not excessive.

Operating Ratio is costs divided by revenue. Transconex shows for the period 4/1/75 to 3/31/76 Operating Expenses of $439,425.76, and Operating Revenues of $455,995.42 for an operating ratio of 96.37%, and for the period 4/1/76 to 3/31/76 Operating Expenses of $486,969.00, and Operating Revenues of $460,512.00 for an operating ratio of 94.60%. (Ex. 1, p. 31)

DISCUSSION

The participants in this proceeding, especially their attorneys, namely Edward A. Ryan and Alan F. Wohlstetter for respondent, and Martin McAlwee, C. Douglass Miller, Acting Deputy Director, and John Robert Ewers, Director, Bureau of Hearing Counsel, deserve and hereby are commended and thanked for making cooperatively a record in this proceeding containing supporting and underlying records and accounts by which the accuracy and sufficiency of the evidence may be tested as to its probativeness, reliableness and substantialness, for findings as to the lawfulness of the instant rates under section 18 of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

From the first prehearing conference held June 29, 1976, an interim meeting between the parties on July 12, 1976, the further prehearing conference held September 30, 1976, and through the hearing held November 30, 1976, all efforts were bent to going forward with the intent of presenting a case that will enable those interested to scrutinize the material which has been utilized in these proceedings. The economists and accounts cooperated well.

The respondent submitted its testimony for its case in chief on August 18, 1976, to show the lawfulness of the rate increase. Hearing Counsel and its technical staff reviewed that testimony, conferred with the respondent, and submitted the testimony of its witnesses (Exhs. 3 and 4). Transconex gave its statement of position (Exh. 2). And, in a letter dated November 22, 1976, stated, *inter alia*, ". . . Transconex will not file any rebuttal testimony in response to the direct written testimony of the witnesses of Hearing Counsel. . . ."

All of the testimony with attachments is part of this record. All of this has been closely examined by the Presiding Administrative Law Judge. It shows that the respondent has experienced increased costs of operation; that the respondent apparently operates efficiently. Some indication of need for the increases has been shown, and no computation made with respect to the increases shows them to be improper.

Upon consideration of the above and the entire record herein, the Presiding Administrative Law Judge *finds* and *concludes* the rate increase now in effect in Transconex, Inc.'s Tariff FMC–F No. 2, effective August 21, 1976 (which cancelled FMC–F No. 1) as to rates applicable to commodities in the Virgin Islands trade is not unjust or unreasonable. The increased rates withstand the test of operating ratio and rate of return on rate base. Thus, tested by several criteria, as properly they should be the rates herein are found just and reasonable.

Wherefore, it is *ordered*, subject to review by the Commission per its Rules of Practice and Procedure,

(A) The rate increases in this investigation be and hereby are found just and reasonable and shall continue in effect, until or unless otherwise changed or ordered.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 503

SHUMAN PLASTICS INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 22, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 22, 1977.

It is Ordered, That applicant is authorized to waive collection of $4,330.60 of the charges previously assessed Shuman Plastics International, Ltd.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 503 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976 through August 25, 1976, the special rate to Hong Kong on 'Synthetic Resin Product Scrap', measuring up to 80 cu. ft./2000 lbs, is $73.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 503

SHUMAN PLASTICS INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

January 26, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90-28) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on three shipments of synthetic resin scrap, that moved from New York, N.Y. to Hong Kong, P.R.C., under Sea-Land bills of lading dated June 24, 1976, July 9, 1976, and August 13, 1976. The application was initially filed on December 21, 1976, with an amendment filed on January 6, 1977. (The amendment related only to correction of an error in computation.)

The subject shipments moved via mini-bridge service under through rail-water rates published in Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92. The shipments moved via rail to Oakland, California, then via Sea-Land from Oakland to Hong Kong. Waiver of collection of the charges involved herein would affect only the ocean carrier's portion. The aggregate weight of the three shipments was 118,216 pounds, with an aggregate measurement of 4,275 cubic feet. The rate applicable at time of shipment was $138 per 2,000 pounds or 40 cubic feet, plus 40 cents per cubic foot if measuring over 70 cubic feet per 2,000 pounds (Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 581 2000 79, 2d revised page 352). The rate sought to be applied is $73 per 2,000 pounds

[1] This decision became the decision of the Commission on February 28, 1977.
[2] 46 U.S.C. 817, as amended.

(Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 581 2000 79, 3rd revised page 352).

Aggregate freight charges payable, pursuant to the rate applicable at the times of shipment, amounted to $8,542.81. Aggregate freight charges at the rate sought to be applied amount to $4,212.21. The difference sought to be waived is $4,330,60 (three shipments, total). The Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same time period at the rates involved in these shipments.

Sea-Land offers the following as grounds for granting the application:

(4) A special mini-landbridge rate of $73.00 per 2000 lbs. when measuring not more than 80 cu. ft. per 2000 lbs. was established from Atlantic coast terminals to Hong Kong on Synthetic Resin Scrap effective September 15, 1975 on original page 352 of Tariff No. 234, FMC No. 106. Publication was made in Item 581 2000 79 with an expiration date of January 31, 1976 that was extended to April 30 in Rule No. 10 (Attachment No. 1).

Effective May 1, 1976 a general rate increase was published in Tariff No. 234, following a comparable general increase published in the all-water rates by the Far East Conference. In preparation for it, Sea-Land's trans-Pacific pricing department in Oakland office had decided that the increase would not be applied to any of these special rates that had been established independently to meet other competitive carriers' rates. Instructions to follow were given to all concerned in teletype message dated January 23 (Attachment No. 2).

When publishing the increase, through clerical and administrative oversight extension of the expiration date beyond April 30 in circle reference E–2 in Rule 10. This error resulted in expiration of the special rate of $73.00W in Item 581 2000 79, although the rate continued to be carrier on 1st and 2nd revised pages 352 (Attachment No. 3), and subsequently the explanation of circle E–2 reference was removed from Rule 10 on 7th Revised page 86 effective July 1, 1976 (Attachment No. 4). The error in allowing the special rate to expire with April 30 left only the standard rate of $138.00W/M in that same item to apply on shipments to Hong Kong.

The shipments involved in this application were originally rated at the rate of $73.00W/M and charges paid on that basis by the complainant through his freight forwarder. Sea-Land found the mistake in the applicable tariff rate in the course of normal internal rate audit functions and issued balance due bills to the shipper.

Sea-Land did not intend to increase these special rates on May 1 and so advised the shipper by letter dated April 23, 1976 (Attachment 5). Upon receipt of the balance due bills, the shipper rejected them by letter dated November 5, 1976 (Attachment No. 6). Sea-Land pricing personnel adjusted the failure to extend the special rate by flagging it with a circle E–3 reference, expiration date of October 31, 1976, on 3rd revised page 352 effective August 25, 1976 (Attachment No. 7). Copies of the bills of lading—freight bills and a statement of the charges sought to be waived are contained in Attachment No. 8.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That

the common carrier . . . has, prior to applying to make a refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the failure to withhold the general rate increase from the special rates, as had been promised to the shipper.
2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.
4. The application was filed within one hundred and eighty days from the dates of the subject shipments.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $4,330.60. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 26, 1977.

[3] For other provisions and requirements, see § 18(b)(3)and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-23

AGREEMENT NO. 8080-11, AMENDMENT TO THE ATLANTIC AND GULF/INDONESIA AGREEMENT; AGREEMENT NO. 8240-9, AMENDMENT TO THE ATLANTIC AND GULF/SINGAPORE, MALAYA AND THAILAND CONFERENCE AGREEMENT; AGREEMENT NO. 8080-13, AMENDMENT TO THE ATLANTIC AND GULF/INDONESIA CONFERENCE AGREEMENT

ORDER ON REVIEW

January 31, 1977

On July 12, 1975, the Atlantic and Gulf/Indonesia Conference (AG/IC) and the Atlantic and Gulf/Singapore, Malaya and Thailand Conference (AG/SMTC) each filed an amendment (Agreement No. 8080-11 and 8240-9, respectively) to their basic conference agreements. As proposed, these amendments would expand the jurisdiction of each conference to include ports, points and places on tributary inland waterways.

On July 9, 1975, another amendment (Agreement No. 8080-13) was filed with the Commission by AG/IC. As proposed this amendment would extend the jurisdiction of AG/IC to "intermodal" movements of cargo which include as a part of such movement the transportation of cargo from an Atlantic or Gulf port to Indonesia (including Timor and W. New Guinea).

Seven months prior to the filing of the conference amendments, in November 1974, Central Gulf Lines (Central Gulf) applied for membership in each conference. Central Gulf's applications were approved by each of the conferences on June 21, 1975, to become effective on July 14, 1975.

The basic conference agreements of the AG/IC and AG/SMTC require that proposed amendments to these agreements be approved by a unanimous vote of the conference members. Although it still was awaiting admission to the AG/IC and AG/SMTC at the time the conference member lines voted to amend their conference agreements Central Gulf indicated its objection to any extension of conference jurisdiction beyond ocean-port to ocean-port movements. Immediately upon becoming a member of the conferences, Central Gulf formally expressed its disagreement with each of the three proposed amendments, and requested that the conferences withdraw them from further Commission consideration.

On July 21, 1975, and August 18, 1975, Central Gulf, by then a member of AG/IC and AG/SMTC, filed protests with the Commission to the approval of the agreements. In response to the protests filed by Central Gulf, the Commission on April 21, 1976 ordered an investigation and hearing concerning the three proposed conference amendments.[1]

Administrative Law Judge Stanley M. Levy, pursuant to a motion to dismiss filed by Central Gulf, thereafter discontinued the proceeding. The Presiding Officer, relying on prior Commission determinations,[2] concluded that the subject amendments are not "agreements," within the meaning of section 15 of the Shipping Act, 1916, because, prior to their approval by the Commission, a member of the conferences, *i.e.* Central Gulf, had indicated that it did not assent to the amendments, thereby destroying the required unanimity. Having so determined that there were no agreements before the Commission to approve, he discontinued the proceeding. No exceptions to the Presiding Officer's ruling were filed. The Commission subsequently determined to review the Presiding Officer's Order discontinuing this proceeding.

We find that the Presiding Officer misinterpreted the *Hong Kong Tonnage Ceiling* decision and its progeny and erred in finding that Central Gulf's admission to the conference vitiated the required unanimity. In *Hong Kong Tonnage Ceiling* the Commission considered the impact of the withdrawal of one of the *original* signatories from the agreement prior to Commission approval. The factual situation in *Hong Kong Tonnage Ceiling* though somewhat similar is clearly distinguishable from the factual situation obtaining in the instant proceeding.

The circumstances here are more akin to those surrounding the agreement put at issue in Docket No. 72–46—*Agreement No. 57–96—Pacific Westbound Conference Extension of Authority for Intermodal Services,* served July 2, 1975.[3] There, Seatrain International, S.A. (Seatrain) had applied for membership in the Pacific Westbound Conference, which has a unanimity requirement for amendments to the conference agreement. Prior to the admission of Seatrain, the conference adopted and filed an amendment, designated Agreement No. 57–96, with the Commission for approval. Seatrain protested the agreement and opposed its approval. In approving the agreement the Commission did not specifically address the impact of Seatrain's dissent on the conference unanimity provision. However, by approving the agreement the Commission determined, albeit by implication, that the entry of a new conference member does not invalidate a prior unanimous conference action, even though that action has not yet received Commission approval.

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[1] By letter, dated June 29, 1976, counsel for AG/SMTC advised the Commission that Agreement No. 8240–9 was withdrawn and that "Such agreement need not therefore be considered further under the pending Commission proceeding Docket No. 76–23."

[2] *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134 (1966); *New York Freight Bureau (Hong Kong),* 10 F.M.C. 165 (1966); *Inter-American Freight Conference—Cargo Pooling Agreements,* 14 F.M.C. 58 (1970); *Agreement No. T-2336—NYSA,* 11 S.R.R. 432, 435, n. 6 (1970); and *Agreement No. 2423—Port of Seattle,* 12 S.R.R. 91 (I.D.), *aff'd,* 12 S.R.R. 221 (FMC, 1971).

[3] The final order in this proceeding was served on September 20, 1976.

Thus, there is a critical difference between the pertinent facts of *Agreement No. 57-96* and the present proceeding on the one hand and *Hong Kong Tonnage Ceiling* on the other. In the latter proceeding (*Hong Kong*), withdrawal of an *original* party prior to Commission approval vitiated the agreement. In the former proceeding (*Agreement No. 57-96*), the entry of a new conference member did not abrogate the previously unanimous conference filing. That result is clearly controlling here. Accordingly, we find that the Presiding Officer erred in ruling that no agreement existed on which he and the Commission could act.

While we disagree with the Presiding Officer's reasons for discontinuing the proceeding, we nevertheless concur in such discontinuance, albeit on other grounds. As previously noted no party to this proceeding including AG/IC, the proponent of the agreements, filed exceptions to the Presiding Officer's ruling that there was no valid agreement before the Commission. We consider this failure to except to the Presiding Officer's ruling tantamount to acquiescence in that decision and construe it as an effective withdrawal of these agreements from the Commission's consideration.[4]

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

[4] See, *Seaboard and Western Air Mail Authorization*, 29 CAB 49 (1959), where the Civil Aeronautics Board held that the failure of a party to except to an examiners decision is tantamount to acquiescence in that decision.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 75–4 AND 75–5

DEPARTMENT OF DEFENSE AND MILITARY SEALIFT COMMAND

v.

MATSON NAVIGATION COMPANY

ORDER ON APPEAL OF DISMISSAL

February 2, 1977

This consolidated proceeding[1] is before the Commission on an appeal taken by the Military Sealift Command (MSC), from a ruling of Administrative Law Judge William Beasley Harris dismissing complaints filed by the Department of Defense and MSC.[2] A previous dismissal of the same complaints by the Presiding Officer was remanded by us on appeal on the grounds that the Presiding Officer had failed to set forth any reasons or basis for his conclusion that the Complainants had failed to make out a case on the facts and the law as required by the Administrative Procedure Act and the Commission's Rules of Practice and Procedure.[3]

On remand, the Presiding Officer in a Supplemental Order of Dismissal again found that the Complainants had not supported their allegation that Matson's failure and refusal to file appropriate military class rates is an unjust and unreasonable practice under section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933. According to the Presiding Officer, ". . . the evidence presented by [Complainants] bears little relevance to their allegations and burden of proof," and ". . . no violation of the Shipping Act has occurred as a result of Respondent's failure to continue the past practices of simplified rates for military cargo."

MSC has appealed the dismissal. Matson Navigation Company (Matson), Hearing Counsel, and the Household Goods Forwarders Association of America, Inc. (HHGFAA), have responded in support of the dismissal.

MSC raises four principal objections to the Presiding Officer's ruling.

[1] Docket No. 75–4 involves Matson's rates between the West Coast of the United States and Hawaii, and Docket No. 75–5 deals with Matson's rates between the West Coast and Guam.

[2] Hereinafter, all references will be to MSC since it is the entity which is actively litigating the case.

[3] Order on Appeal from Presiding Officer's Dismissal of Complaint, April 9, 1976.

First, it is alleged that the Presiding Officer failed to comply with the Commission's Order on Remand in that his Supplemental Order fails to make findings and conclusions as well as state reasons or basis therefore upon all material issues of fact, law, or discretion presented on the record.

Second, MSC contends that the Presiding Officer erred in dismissing the complaints because of noncompliance with Department of Defense regulations requiring that the furnishing of the full noun-nomenclature of items shipped by MSC with Matson. MSC alleges that the Presiding Officer apparently concluded that MSC's noncompliance with DOD regulations was willful and therefore, MSC was undeserving of what the Presiding Officer termed, "equitable relief." MSC notes that the evidence in the record indicates that compliance with DOD regulations is not an easy matter but explains that it has attempted to conform to those regulations.

Third, MSC argues that the Presiding Officer erred in holding that the Commission has no authority to require Matson to continue the class rate structure formerly in effect. According to MSC, the case cited by the Presiding Officer in support of his statement is inapplicable to the issues in the current proceeding.

Finally, MSC contends that the Presiding Officer erred in his endorsement and adoption of the reasoning of Matson and Intervenors to the extent that that reasoning is erroneous. MSC argues that the Presiding Officer's endorsement and adoption of these positions is insufficient to satisfy section 8 of the Administrative Procedure Act or Rule 13(e) of the Commission's Rules. In responding to the various arguments raised on brief, MSC incorporates its previous reply brief which addresses the arguments and positions raised by Matson and Intervenors in their earlier Motions to Dismiss.[4]

Matson, in its response to MSC's exceptions, is of the opinion that the Presiding Officer's Supplemental Order does contain adequate findings, conclusions, and reasoning and should be affirmed by the Commission. Matson argues that MSC offered no evidence that it is currently paying excessive freight charges by reason of its inability to identify cargoes. The evidence introduced allegedly indicates that MSC's cargoes were properly and adequately identified and the lowest applicable rate under Matson's tariff applied; that no effort was made by MSC to quantify the expense that might be involved in changing existing documentation procedures; and, further, that MSC has failed to offer any proof as to whether it is currently paying a greater or lesser amount than the "fully allocated costs plus a reasonable system average return" level of rates which MSC now asks the Commission to prescribe for it.

Finally, Matson believes that the proposed class rates which MSC

[4] For a fuller discussion of the arguments and positions raised by the parties for and against the Motions to Dismiss see our Order of April 9, 1976, which summarizes these arguments.

would like to see established would violate sections 18(a) and 16, First of the Shipping Act, 1916. These "class rates" would allegedly create a classic example of unjust discrimination in which the sole justification for the discrimination rests not in transportation conditions but rather on the identity of the shipper.

Hearing Counsel also urge the Commission to uphold dismissal of the complaints. In so doing, they rely on the arguments advanced in their Motion to Dismiss of October 30, 1975, wherein they contended that the repeal of section 6 of the Intercoastal Shipping Act of 1933 precluded the type of rate structure requested by MSC; that MSC's difficulties in rating military cargoes in accordance with commercial tariffs were the result of its own failure to administer the MILSTAMP (Military Standard Transportation Movement Procedures) system to the extent of its capabilities and its obligations; and that there has been a failure of proof on the issue of the proper level of rates assessed MSC by Matson.

HHGFAA advised by letter that while it would not submit a separate pleading in response to MSC's appeal it also would rely on its earlier Motion to Dismiss in support of the Presiding Officer's ruling and in opposition to the appeal of MSC. In this regard, the comments of HHGFAA generally followed those presented by Hearing Counsel.

We have reviewed the Supplemental Order of Dismissal of the Presiding Officer and find that it substantially complies with the requirements of the Administrative Procedures Act and our own Rules of Practice and Procedure.

The Presiding Officer's Order makes clear his findings and provides an adequate explanation for the ultimate conclusion reached, *i.e.*, that the Complainants have failed to meet their burden of proof and that no violation of the Shipping Act has occurred as a result of Matson's failure to file class rates for military cargo. We find that the Presiding Officer's Order is procedurally sufficient and agree with his ultimate disposition of this matter.

In its appeal MSC argues that:

> A mere endorsement and adoption of the reasoning in the initial Order of Dismissal which the Commission found deficient can hardly in itself contain a cure for that deficiency.

MSC apparently misconstrues our remand. We took no position with respect to the merits of the arguments advanced by any of the parties in the initial Order of Dismissal. Our concern was with the failure of the Presiding Officer to adequately explain the basis for his conclusions. We believe that he has rectified that deficiency in his Supplemental Order of Dismissal.

MSC excepts to the Presiding Officer's reliance on Complainant's noncompliance with DOD regulations requiring that the military furnish the full noun-nomenclature of items shipped as a ground for the dismissal of its complaint. It is true that the Presiding Officer did place significant

emphasis on MSC's failure to o conform to MILSTAMP which essentially requires that there must be a complete description of the cargo so that a proper determination can be made as to which commercial tariff to apply. The Presiding Officer found that:

> [S]uch noncompliance undoubtedly relates directly to the controversy immediately involved in this proceeding and is of such a character as renders the Complainants interest undeserving of the protection or equitable relief sought. Equity requires that he who invokes its aid in any transaction must be ready to perform in reference to that transaction whatever justice may demand.

This finding appears to reflect a belief that MSC is attempting to obtain a rate structure which would free it from having to comply with its own regulations. In this regard, MSC's problems in complying with MILSTAMP do not, in and of themselves, provide a proper basis for finding Matson's present rate structure unreasonable in violation of section 18.

We do not share MSC's concern over the Presiding Officer's consideration of *Scott Paper Co. v. Puerto Rico Maritime Shipping Authority*, Docket No. 74-43, 14 SRR 1616 (1975), and its possible impact on this proceeding. Our disposition of the appeal now before us can be made without recourse to the possible application of *Scott Paper* to this proceeding.

In its appeal, MSC cites a number of substantial issues of law or of mixed law and fact which they believe must be resolved before a decision on the motions can be reached. Certain of these issues are present in another proceeding, Docket No. 75-20, *Puerto Rico Maritime Shipping Authority Rates on Government Cargo,* now pending initial decision, and we see no reason to address those issues in this proceeding. However, we do believe that to properly dispose of the matter before us the first legal issue raised by MSC should be resolved. As framed by MSC, this issue reads as follows:

> Does the repeal of section 6 of the Intercoastal Shipping Act of 1933 preclude as a matter of law a separate simplified rate system like that requested to be established in our complaints and in substance like that used by MSC with Matson and other common carriers before that repeal?

Much has been said about the Congressional intent in repealing section 6 of the Intercoastal Shipping Act, 1933. MSC argues that the condition intended to be corrected by the repeal of that section was not the *nature* of government rates but the *level* of such rates. Thus, MSC contends that provided the level of rates for the carriage of military cargo was fair and reasonable vis-a-vis commercial cargo a different class of rates for military cargo could be established. For the most part, the other parties in the proceeding appear to take the position that MSC is not entitled to any preference whatsoever and rates on military cargo must take the same form as commercial rates.

We believe that to a certain extent both positions are correct. Congress was concerned that the rates on commercial cargoes were subsidizing the

carriage of government cargoes.[5] To rectify this problem, Congresss repealed section 6 and amended section 5 of the Intercoastal Shipping Act, 1933 so as to provide for the economic regulation of rates on government cargo. These rates must now meet the same statutory standards of reasonableness and fairness as presently apply to rates charged for the transportation of commercial cargo in the applicable trades.

What Congress has done is to require that rates for the carriage of government cargoes be established on the same basis as commercial rates. In other words, the government is no longer statutorily entitled to reduced rates but must justify such rates on valid transportation factors. This was recognized in the Senate hearings on P.L. 93–487 in the following exchange between Senator Inouye and FMC Commissioner James V. Day:

> Senator Inouye: If Section 6 were repealed, wouldn't the federal government still be eligible to obtain special rates based on demonstrable savings from the transport of government cargo, such as volume, lack of advertising, etc.?
>
> Answer: Commissioner Day: That is a correct statement, Mr. Chairman. As I pointed out, removal of Section 6 from the Intercoastal Act would not preclude the obtaining of lower rates by anyone—the government, states and local jurisdictions, or charities. In fact those shippers mentioned in Section 6 may find that when Section 6 is repealed the carrier's compensable transportation costs will be such that the true considerations—service, transit time, time of tender, etc.—and *not* the outdated, artificial foundation of Section 6, result in lower rates.

Senate Report No. 93–1278 also supports this position. It states in part:

> Deletion of section 6 need not mean that the government and commercial rates will be the same. In instances where the government can show that there are cost savings in the carriage of government cargo, it will be entitled to obtain lower rates.

The fatal flaw in Complainant's case is that they have failed to establish valid demonstrable savings to the carrier from the transport of government cargo. MSC, as any other shipper, could justify a particular rate if based on proper transportation factors. However, the evidence in this record does not support the establishment of MSC's class rates. We do not consider MSC's principal concern, *i.e.*, the difficulty of rating military cargoes in accordance with commercial tariffs, as sufficient to justify the lower class rates. MSC's proof goes primarily to this alleged difficulty.

Therefore, we conclude that while the repeal of section 6 of the Intercoastal Shipping Act, 1933 does not preclude as a matter of law a separate simplified rate system, such a rate structure must be based on valid transportation factors. The record in this proceeding does not establish the necessary factors.

It follows, therefore, that MSC's allegations of section 18(a) violations

[5] The legislative history of P.L. 93–487 which repealed section 6 is found in the published *Hearings Before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Representatives, 93rd Congress, Second Session, on Rate Exemptions*, H.R. 13501 and H.R. 13615, July 10, 1974, Serial No. 93–47, pp. 1–55; *Hearings Before the Subcommittee on Merchant Marine of the Committee on Commerce, United States Senate, 93rd Congress, Second Session, on S. 3173*, August 9, 1974, Serial No. 93–101, House Report No. 93–1348 of September 11, 1974 and Senate Report No. 93–1278 of October 11, 1974.

on the part of Matson because of its refusal to file "appropriate military class rates" are unsupported in this record. MSC has failed to establish that Matson's present rate structure is unreasonable as applied to MSC vis-a-vis other shippers. Similarly, MSC's request that container rates for military cargo be established at a level that will provide Matson "a return equivalent to the fully allocated costs of transporting those classes of cargo plus an appropriate return on its investment in the trade" would, to the extent that such a standard is not applied to commercial shipments, put MSC in a preferred class. This would establish a special class of rates applicable only to military cargoes and, without additional justification, would clearly be contrary to the intent of Congress in repealing section 6 of the Intercoastal Shipping Act of 1933.

THEREFORE, IT IS ORDERED, That MSC's appeal of the Presiding Officer's ruling on dismissal is denied and the proceedings in Docket Nos. 75–4 and 75–5 are hereby dismissed.[6]

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

[6] The various motions to dismiss now before us were made at the conclusion of MSC's case in Docket 75–4 and Docket No. 75–5 except for the receipt of certain expert evidence concerning the level of class rates requested under Docket No. 75–5 which was postponed by agreement and consent. Such evidence is now irrelevant, however, in view of our finding that the record does not support the establishment of any class rates.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter A—General Provisions

[GENERAL ORDER 16 AMDT *16*, DOCKET NO. 76-49]

Part 502—Rules of Practice and Procedure

February 4, 1977

Miscellaneous Amendments

This proceeding was instituted by notice of proposed rulemaking published in the Federal Register of September 20, 1976 (41 F.R. 40504). The purpose of the proceeding was to amend appropriate sections of the Commission's rules of practice to (1) specify that, in proceedings under section 15 of the Shipping Act, 1916, parties to the agreement shall be designated "proponents" and parties opposing approval shall be designated "protestants"; (2) place in the presiding officer the authority to rule on production of witnesses and materials located in a foreign country; and (3) establish a procedure for Commission review of orders of dismissal by presiding officers which have not been appealed.*

Comments were submitted by the Council of European and Japanese National Shipowners' Association (CENSA); Japan/Korea Atlantic and Gulf Freight Conference, Trans-Pacific Freight Conference of Japan/Korea, New York Freight Bureau, and Trans-Pacific Freight Conference (Hong Kong) (Conferences); Maritime Administrative Bar Association (MABA); and the Commission's Bureau of Hearing Counsel (Hearing Counsel). We have considered these comments carefully and herewith publish final rules. A section-by-section analysis of the rules and comments thereon follows.

1. Section 502.41 was proposed to be amended by designating parties to agreements as "proponents" and parties opposing approval as "protestants" in proceedings relating solely to approvability of section 15 agreements. The proposal is designed to eliminate the current and misleading designations of "respondents" and "petitioners."

*For a fuller explanation of the purpose of the proposed amendments, see notice of proposed rulemaking cited above.

No comment was made to this proposal and it will be incorporated in the final rule.

2. Sections 502.210 and 502.136 were proposed to be amended and section 502.211 deleted to the net effect that presiding officers would rule on the production of witnesses and materials located in a foreign country. It was believed that the proposed procedure would eliminate confusion and delay occasioned by the present system of dual jurisdiction, i.e., authority in the presiding officer to compel production of witnesses and materials located in the United States and in the Commission with respect to a foreign country.

CENSA objects to the proposals on the ground that the Commission alone should deal with matters which might arise from attempts to obtain documents or subpoena persons abroad. It points out that the current standards for quashing subpoenas might not encompass, for example, prohibitory statutes of other nations. If the Commission adopts the proposals, CENSA urges that procedural guarantees be incorporated, i.e., the presiding officer be required to consider the effect on international relations in making any ruling and that parties have an absolute right to appeal any such ruling.

The Conferences generally echo CENSA's position as to the Commission's traditional role in matters of international import. They assert also that the efficiency to be gained under the proposal is illusory in that the Commission would ultimately have to enforce any order of the presiding officer. They also urge the right of immediate appeal.

MABA takes no position on the question of whether presiding officers should have the proposed authority since its members are divided on this question. MABA, however, questions the authority of the Commission to limit the time within which a private party may bring an enforcement action.

Hearing Counsel support the proposal generally but would revise the wording of section 502.210(d) to make clear that *only* the Commission shall enforce orders and that enforcement is discretionary.

The matter of enforcing orders abroad is not a common one but when it occurs it is a matter of concern. The process is very delicate, perhaps involving other entities of the government, e.g., Department of State. The Commission should be the entity making such determinations based on policy as well as legal considerations. Accordingly, we shall not adopt this aspect of the proposal.

We believe, however, that the presiding officer should at least be able to determine whether the problem is one for him or the Commission. Accordingly, we are amending section 502.210(a) to require an answering party to indicate whether or not witnesses or documents are located in a foreign country. Section 502.136 will be amended in accordance with all the foregoing.

3. Section 502.227 was proposed to be amended by providing specifi-

cally for review of orders of dismissal by presiding officers. At present, the rules are silent as to this.

MABA is of the opinion that the present rules permit review of dismissals by the Commision but supports the proposal as stating the Commission's authority explicitly.

Hearing Counsel would add language to insure that service of a notice to review would not constitute a reopening of the record.

At the time of fashioning its proposal, the Commission was attempting to do what MABA suggests, i.e., clarify the rules. As to Hearing Counsel's addition, we feel it unnecessary. A record can not be reopened automatically; only the presiding officer or Commission, as appropriate, may do so.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 27 and 43 of the Shipping Act, 1916 (46 U.S.C. 826, 841a), Part 502 of Title 46, Code of Federal Regulations is amended.*

Effective Date. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be effective upon publication in the *Federal Register* and shall be applicable to all pending and future proceedings.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 502.41, 502.210(a), 502.136, 502.227.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-66

AUSTASIA CONTAINER EXPRESS, A DIVISION OF AUSTASIA INTERMODAL LINES, LTD.—POSSIBLE VIOLATIONS OF SECTION 18(b)(1) AND GENERAL ORDER 13

Respondent found to be a nonvessel operating common carrier in the foreign commerce of the United States within the meaning of section 1, Shipping Act, 1916, even though the water portion of the through transportation offered commenced at a Canadian port.

Respondent ordered to file a tariff pursuant to section 18(b)(1), Shipping Act, 1916, and General Order 13 of the Commission's Rules; section 1 carriers are subject to through route tariff filing requirements regardless of whether they make a vessel call at an United States port.

Charles F. Warren and *George A. Quadrino* for respondent.

Stanley O. Sher and *Jacob P. Billig* for intervenor U.S. Atlantic & Gulf/Australia-New Zealand Conference.

Patricia E. Byrne and *Donald J. Brunner,* Hearing Counsel.

REPORT AND ORDER

February 7, 1977

BY THE COMMISSION: Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey, James V. Day, *Commissioners.*

This proceeding was instituted to determine whether Austasia Container Express (ACE), an unincorporated division of Austasia Intermodal Lines, Ltd., is a common carrier by water in the foreign commerce of the United States within the meaning of section 1 of the Shipping Act, 1916 (Act), and section 510.21(d) of the Commission's Rules (Rules),[1] and, if so, why ACE should not be found in violation of section 18(b)(1) of the Act or section 536.16 of the Rules for operating without filing a Federal Maritime Commission tariff.[2] The U.S. Atlantic and Gulf/Australia-New Zealand

[1] Section 510.21(d) of the Rules defines "nonvessel operating common carrier." Copies of the pertinent regulations and statutes are appended hereto.

[2] Section 536.16 concerns the filing of through rates and through routes. It was adopted in 1970 as Amendment 4 to General Order 13 (35 F.R. 6397).

Conference (Conference), a group of vessel operating common carriers in the U.S./Australia trade making direct calls at U.S. ports, intervened.[3]

BACKGROUND INFORMATION

ACE, since June 1972, through direct contact, mail, and newspaper advertising, and shipping agents located in Detroit, Chicago and New York, has held itself out to U.S. freight forwarders and shippers as offering a through common carrier service from Detroit, ACE's principal place of business, to various Australian ports.[4] The service is conducted in the following way:

(1) Shippers deliver their cargo to a freight consolidator contracted for by ACE and located within the Detroit Commercial Zone (presently in Romulus, Michigan). There it is assembled into carload lots in containers leased to ACE;

(2) Under a contract with ACE to move the goods from Detroit to Vancouver, British Columbia, the Canadian Pacific Railway (CPR) subcontracts with a truck line to carry carload lots from the consolidator in Detroit, to Windsor, Ontario;[5]

(3) From Windsor, the cargo moves by rail to container yards in Vancouver;

(4) ACE contracts with various steamship lines calling at Vancouver for the ocean carriage of the containers. These lines do not sail directly to Australia, but proceed to Japan where the containers are transshipped to other vessels calling directly at Australian ports;

(5) Containers are delivered at the Australian ports of Sydney and Melbourne. ACE also holds itself out to carry cargo to Adelaide and Brisbane, which it accomplishes by arranging for overland transportation from Sydney or Melbourne.[6]

ACE issues a single bill of lading for this entire movement when the cargo reaches Canada.[7] This bill indicates Windsor as the "Port of Loading" and Detroit as the "pier."[8] Clause 7 indicates that the carrier's responsibility begins at the "port of loading," but ACE claims responsibility for the goods from the moment they are received by its consolidator in Detroit.[9]

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[3] The Pacific-Australasian Tariff Bureau was also granted leave to intervene, but did not participate in any phase of the proceeding.

[4] ACE's advertisements create the impression that ACE is holding itself out as a steamship line and ACE testified that this was its intention. Most of its shipper clients are located in midwestern states.

[5] Windsor is directly across the Detroit River from Detroit. In the past CPR also subcontracted with a ferry operator to move ACE cargo to Windsor, but no longer does so.

[6] ACE reserves the unqualified right to deviate from the above route (Bill of Lading Clause 6; Tariff Rule 19), but has yet to exercise that right.

[7] An onboard bill of lading is generally issued by ACE's agent in Canada after it receives TELEX confirmation that the goods have actually been loaded in Vancouver. *Unless a special request is made, a shipper will only have the Detroit consolidation yard receipt to evidence transfer of possession of his cargo until the onboard bill is issued.*

[8] Windsor is placed on the bill to make it clear that the cargo is routed through Canada. Canadian cargo receives reduced customs duty in Australia, and this is one reason that ACE can ordinarily offer its service at a lower cost then the cost for routing the same cargo through Los Angeles or New York.

[9] The source of this Detroit to Windsor liability was not indicated, but is presumably grounded in common law principles. ACE's advertising infers a unitary bill of lading from *Detroit* to Australia and the single freight rate on the bill of lading covers the entire movement from Detroit to Australia.

ACE has no tariff on file for this service. In 1972, ACE prepared a tariff, but was informally advised by the Commission's staff that filing was unnecessary. This 1972 tariff is still the basis for ACE's rates; various surcharges and other assessments are added to the 1972 quotations to arrive at the present charges. Only ACE knows how its rates are determined. A shipper usually discovers a rate by requesting such information from his forwarder or agent who in turn asks ACE. The record does not reveal whether ACE's tariff is available for public inspection.

American Container Express, Inc., a corporation owned and controlled by the same individual who controls Austasia Intermodal Lines, Inc., possesses ICC Part IV freight forwarder authority to carry containerized export cargo (general commodities) from all points in Michigan and Ohio to Michigan "ports of entry."[10] This Part IV operation also employs the ACE trade name and presumably has assumed all United States functions of Austasia Intermodal Lines, Inc.[11] Despite the fact that two bills of lading are required, ACE apparently offers an effective "door-to-door service" from U.S. inland points to Australia.

Through the end of 1974, ACE carried about 8,000 revenue tons of export cargo, served 40–50 United States shippers and issued 900–1000 bills of lading. ACE stipulated that it competes with the all water service offered by the Conference.

Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision holding that ACE is not a common carrier by water subject to the Commission's jurisdiction. This decision relies primarily on the legislative history of Shipping Act section 1. When the Alexander Committee examined the steamship industry in 1913, all water, port-to-port transportation was the only significant type of ocean carriage available. This fact, plus certain testimony relating to the final legislation adopted in 1916, led the Presiding Officer to conclude that the Act's provisions are limited to water carriers *physically serving* U.S. ports.[12]

Several court and Commission decisions are also quoted in support of this result.[13] The second Circuit's language in *Compagnie Generale Transatlantique, supra,* is typical:

> A steamship company engaged in foreign commerce, *with ships entering the United States' ports* in such commerce, is within the obligation of the Shipping Act, and the fact that the bill of lading was issued in France does not exclude it. (Emphasis added.)

[10] The ICC application (FF–453) of American Container Express, Inc., was granted January 16, 1976, subsequent to the release of the Initial Decision herein. This authority is restricted to export traffic having a subsequent movement *by water.*

[11] Mr. Glenn W. Scherenbach, President of Austasia Container Express, testified that Austasia Intermodal Lines, Inc., would cease operations in the United States once American Container Express, Inc., received its Part IV certificate.

[12] *E.g.,* House Committee on the Merchant Marine and Fisheries, *Hearings on H.R. 14337,* 64th Cong., 1st Sess. (1916). Statements of Representative Hadley, at 32–33; statements of Isider Jacobs (President, California Canneries Co.), at 55–57; and statements of maritime lawyer J. Parker Kirlin, at 128.

[13] *Compagnie Generale Transatlantique, Inc. v. American Tobacco Co.,* 31 F.2d 663, 665 (2d Cir. 1929); *Armement Deppe, S.A. v. United States,* 399 F.2d 794, 797 (5th Cir. 1968); *Pacific Seafarers, Inc. v. A.G.A.F.B.O., et al.,* 8 F.M.C. 461, 465 (1965).

The Presiding Officer further noted that, although the Commission has extended its tariff filing requirements over through routes going beyond port areas[14] and over connecting carriers not themselves calling at U.S. ports,[15] in both instances at least one participating carrier in the through movement made an actual vessel call at a U.S. port.

The Initial Decision also held that Shipping Act section 18(b)(1) was inapplicable to ACE's activities because the words "to and from United States ports and foreign ports" modify the "through route" language of that section and thereby limit its application to water carriers which *physically call* at U.S. ports. This result was supported by the finding that section 18(b)(1) is patterned after Shipping Act section 18(a) and section 2 of the Intercoastal Shipping Act, 1933,[16] and the Commission has described its "through route" jurisdiction under section 2 as applying *only* to arrangements between intercoastal water carriers.[17]

Finally, the Presiding Officer concluded that the jurisdictional underpinning of the Commission's through route and through rate regulations (section 536.16) was exclusively limited to section 18(b)(1). Given his interpretation of section 18(b)(1), it followed that through route/through rate tariffs need be filed only when they include an ocean rate offered by a carrier *physically serving* a U.S. port.

Exceptions to the Initial Decision were filed by the Conference and by Hearing Counsel. ACE filed a Reply to Exceptions. These pleadings largely repeat the arguments presented to the Presiding Officer and address three basic questions: (1) Does section 1 of the Act embrace ACE's service? (2) Must ACE file a tariff under section 18(b)(1) of the Act? (3) Must ACE file a tariff under section 536.16 of the Rules? Hearing Counsel supports the Conference, but argues that ACE's operations are subject to section 1 and this alone determines the tariff filing issue.

POSITION OF THE CONFERENCE

The Conference first states that Ace is a common carrier in foreign commerce because of its undertaking with respect to the public: it widely solicits cargo for and actually undertakes through transportation from the United States to Australia; issues bills of lading in its own name; assumes liability for the entire movement; and charges shippers a single dollar amount therefor.

The Conference argues that while the legislative history of the 1916 Act

[14] 46 C.F.R. 536.16.

[15] *Transshipment Agreement Indonesia/United States*, 10 F.M.C. 183 (1966); *Transshipment Agreement Between S. Thailand and United States*, 10 F.M.C. 199 (1966).

[16] Section 2 states, in pertinent part, that:

> . . . if a through route is established, [a carrier must file] all the rates . . . in connection with transportation between . . . points in its own route and . . . on the route of any other carrier *by water*. (Emphasis added.)

[17] *E.g., Sea-Land Service, Inc.—Cancellation of Rates*, 11 F.M.C. 137, 142, and n. 6 (1967) which concerned the Commission's 1960 rejection of a single-factor joint motor-water tariff between Utah and Hawaii because "it was impossible to determine . . . where FMC or ICC jurisdiction began and ended." See also *Gulf Intercoastal Rates to and From San Diego* (No. 2), 1 U.S.S.B.B. 600, 605 (1936); *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 457 (1935).

may reflect only those shipping problems Congress recognized at that time, this alone does not show a legislative intent to foreclose the Act's application to future technological changes. The Committee testimony cited by the Presiding Officer cannot support a restrictive interpretation of section 1. At best it shows that certain opinions were brought before the Congress. Similarly, the judicial decisions relied on by the Presiding Officer merely indicate that in 1916 shipping lines in fact operated to and from U.S. ports. These cases do not even address the question of whether foreign commerce carriers not physically calling at United States ports are immune from Shipping Act regulations.

The Conference contends that the status of ACE's service must be decided by considering the remedial purposes of section 1 and the breadth of the language employed, and then construing the statute liberally to achieve that purpose. *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 59 (1965). Important regulatory objectives will be frustrated if ACE is held to be outside the Commission's jurisdiction: Ace will continue quoting rates which cannot be verified; shippers will remain unsure whether the same rates or services that are available to them are also available to their competitors; and shippers and ports will have no forum to voice complaints of discrimination or prejudice.

The Conference further claims that if section 1 is not limited to water carriers touching U.S. ports then, *a fortiori,* section 18(b)(1) is not so limited. It states that the words "transportation to and from United States ports and foreign ports" do not themselves evince a Congressional intent that the water carrier must call at a U.S. port, and were not meant to preclude the filing of tariffs by services such as ACE. Moreover, the Conference believes the "to and from U.S. ports" language does not modify the subsequent words "and all through routes which have been established," so that rates for through transportation must be filed even if the through route does not feature a vessel call at a U.S. port.

The Presiding Officer's analogy between section 18(b)(1) and section 2 of the Intercoastal Shipping Act, 1933, is also disputed by the Conference. The fact that the sections are similarly worded does not mean their purpose and intent are the same. In this instance, the analogized statutes are said to cover vastly different trades and have vastly different breadth and purpose. The Presiding Officer's reliance on language from the *Transshipment Agreement* cases, *supra,* is challenged because those cases were not directly concerned with tariff filing pursuant to section 18(b)(1).

Finally, the Conference argues that section 536.16 embraces ACE's service since General Order 13 requires all section 1 common carriers to file rates governing through transportation between ports or points in the United States and ports or points in a foreign country. If Detroit is not a "port," it is at least a "point" for purposes of section 536.16.

POSITION OF ACE

ACE supports the Initial Decision in all respects, primarily contending that: the language of section 1 itself *connotes* port-to-port service; legislative history demonstrates that section 1 requires actual United States port calls for carriers in both domestic and foreign commerce;[18] Detroit is not a "port" in this instance because it is not being directly served by any type of water transportation; the doctrine of liberal construction to effectuate a remedial design cannot establish Commission jurisdiction where all other critical elements are lacking; the "through route" portion of section 18(b)(1) is inapplicable to through routes not involving U.S. ports because the "to and from U.S. ports and foreign ports" phrase of 18(b)(1) applies to, and modifies, the "own route" *and* the "any through route" tariff filing requirements; the "through route" language of section 18(b)(1) was intended to cover only through arrangements *among water carriers,* as was section 2 of the Intercoastal Shipping Act; and, section 536.16 is inapplicable to its NVOCC service because the Commission lacks jurisdiction over the inland portion of the intermodal movements.[19]

DISCUSSION AND CONCLUSIONS

As revealed by the thorough and well presented Initial Decision, the legislative histories of Shipping Act sections 1 and 18(b) contain no statements concerning nonvessel operating carriers or true intermodal cargo movements. The 1916 House and Senate Reports on the bill that became the Shipping Act (H.R. 15455) say little other than to repeat the major recommendations of the Alexander Committee. The only jurisdictional debates involving foreign commerce concerned Senate Amendment No. 1 to H.R. 15455, which excluded all tramp vessels from regulation. See 53 *Congressional Record,* August 29, 1916, at 13365–13366, 13420 and 13426. The House Committee hearings on an earlier bill (H.R. 14337) are inconclusive, if not irrelevant, to the question of whether a direct vessel call at an United States port is necessary for the Commission's section 1 jurisdiction to attach.[20] If Congress in fact formulated an

[18] ACE argues that the absence of the word "port" is insignificant. It states that the word "port" was missing from the definition of *both* foreign commerce and interstate commerce carriers when section 1 was first reported out of Committee; the "regular routes from port to port" language was expressly added to the interstate definition to exclude tramp vessels from regulation, see *Rates of General Atlantic S.S. Co.,* 2 U.S.M.C. 681 (1943); *United States v. Stephen Bros. Line,* 384 F.2d 118 (5th Cir. 1967), and not to otherwise differentiate the two provisions. ACE also submits that the legislative history cited in the Initial Decision involved vessels carrying U.S. exports from Canadian ports and these vessels almost certainly touched U.S. ports during their voyage. Lack of a generalized "*United States presence,*" argues ACE, was not the reason Committee witnesses stated that the Act would not reach these carriers. Rather, the testimony stressed the fact that in carrying U.S. cargo from Canada these vessels did not *physically touch U.S. ports.*

[19] ACE argues that in *Disposition of Container Marine Lines,* 11 F.M.C. 476 (1968) and *Filing of Through Rates and Through Routes,* 11 S.R.R. 574 (1970), the Commission expressly recognized its jurisdiction was over port-to-port and not inland rates; moreover, even if Detroit were considered to be a "port" in this instance, section 536.16 would not require a tariff to be filed because that section applies only to through routes involving a point of origin or destination *beyond a port area.*

[20] The testimony cited by the Presiding Officer was primarily concerned with possible United States losses to Canadian competition if the American shipping industry were strictly regulated.

intention as to how through container movements were to be handled in the 1970's, that intention was not disclosed in 1916 or 1961. What is clear is that the Shipping Act was conceived as a comprehensive regulatory system for oceanborne foreign commerce. Section 1 of the Act included the entire realm of ocean shipping which then existed, with the specific exception of contract carriers, ferryboats, and ocean tramps. The appearance of new technology alone is not a sufficient reason for limiting an agency's jurisdiction when the agency was otherwise intended to possess a broad and unified authority.[21]

The 1916 legislation limited the Commission's *in personam* jurisdiction in only three respects: (1) there must be a common carrier by water which is not a tramp or ferryboat; (2) the carrier must transport cargo between the United States and a foreign country; and (3) the Commission may not exercise "concurrent power or jurisdiction over any matter within the power or jurisdiction of the ICC."[22] These limiting factors have not been altered in the intervening 60 years. Our authority ebbs and flows as Congress modifies the powers and jurisdiction of the ICC, and we conclude that our foreign commerce jurisdiction is not restricted to ocean carriers operating vessels which physically call at United States ports. A common carrier engaged in the through transportation of goods "between the United States and a foreign country" *by water,* is subject to section 1. *Transshipment Agreement, Indonesia/United States,* 10 F.M.C. 183, 191 (1966).

This is not to say the Shipping Act permits the Commission to directly reach the port-to-port rate of an ocean carrier operating only between two foreign countries.[23] This we obviously cannot do. Neither do we envision section 1 as encompassing joint rate/through route international transportation offered by ICC regulated carriers via foreign ports in conjunction with ocean carriers are themselves subject to the Shipping Act.[24]

However, we conclude that ACE is performing all the functions of a nonvessel operating common carrier (NVO) in the foreign commerce of the United States. NVO's have been consistently recognized as section 1 carriers since at least 1952. *Bernhard Ulmann Co., Inc. v. Puerto Rico*

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[21] In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court affirmed the Federal Communication Commission's jurisdiction over cable television transmissions, and stated, at 172:

> Nothing in the language . . . history . . . or purpose [of the Communications Act] limits the [FCC's] authority to those activities and forms of communications that are specifically described by the Act's other provisions. . . . Certainly Congress could not in 1934 have foreseen the development of community television systems. . . .

[22] The latter restriction (Shipping Act section 33) was added to "obviate a conflict of jurisdiction if in some unforeseen manner any substantive provision of this bill inadvertently overlaps a corresponding provision of the Interstate Commerce Act." H.R. Report No. 659, *Creating A Shipping Board, Etc.*, 64th Cong., 1st Sess., at 34 (1916); Sen. Report No. 689, *Creating A Shipping Board, Etc.*, 64th Cong., 1st Sess., at 14 (1916).

[23] American goods exported to Canada on one bill of lading may be shipped elsewhere under a second bill of lading without directly involving this Commission's jurisdiction. However, extraterritorial aspects of section 15 agreements or other anticompetitive actions by section 1 carriers violative of sections 16 or 17 may be within the scope of the Shipping Act. See *Transpacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.2d 928 (9th Cir. 1963); *Pacific Seafarers, Inc. v. PFEL, Inc.*, 404 F.2d 804, n. 16 (D.C. Cir. 1968); *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 F.M.C. 129 (1966).

[24] Although no such ICC tariffs appear to be in effect at present, the ICC has reversed its long standing prohibition against joint rate/through route international tariffs to nonadjacent countries. *Ex Parte 261*, 337 I.C.C. 625–632 (1970).

Express Company, 3 F.M.B. 771, 775–778 (1952). They undertake to provide ocean transportation to the public and are subject to the same tariff filing requirements as vessel operating carriers (FMC General Order 13; 46 C.F.R. Part 536).

NVO's tend to operate exclusively from United States port cities, because most, if not all, NVO's exist only because of gaps in the coverage of the Interstate Commerce Act. See generally, *IML Sea Transit, Ltd. v. United States*, 343 F. Supp. 32 (N.D. Calif. 1972), aff'd *per curiam*, 409 U.S. 1002 (1972). One such exemption is the partial exclusion from Part II regulation for motor carriers operating entirely within a single "commercial zone" which is now benefiting ACE.[25] If ICC jurisdiction attached to the movement of ACE's cargo from Romulus to Windsor, then the motor carrier would be involved in joint through international transportation with a non-Shipping Act water carrier—subject solely to ICC regulation and to that agency's tariff filing requirements.

If an ICC regulated motor carrier and a section 1 water carrier offer a joint through international service, they must file a tariff listing their through rate and their respective rate "divisions" or "portions" at *both* the FMC and the the ICC. *Ex Parte 261*, 351 I.C.C. 490 (1976); *Filing of Through Rates and Through Routes*, 11 SRR 574 (1970). In contrast to both the above possibilities, ACE files no tariff in the United States or Canada and asserts immunity from regulation by either the ICC or this Commission.[26]

ACE's operation differs from other NVO's only in that it does not issue a bill of lading for its through service until the goods reach Canada (so its shippers can realize Australian entry duties), and the underlying water carrier does not call at a United States port. To accord jurisdictional significance to these artificially contrived distinctions would exalt form over substance. It would also leave a significant loophole in the Shipping Act's protective mantle.[27] There is a presumption against construing statutes in a manner which renders them ineffective or inefficient. *Bird v. United States*, 187 U.S. 118, 124 (1902); *United States v. Blasius*, 397 F.2d 203, 207, n. 9 (2nd Cir. 1968), *cert. dismissed*, 393 U.S. 1008 (1969). In the absence of express legislative direction, we must apply section 1 in the manner most likely to effectuate the undisputed remedial policies

[25] 49 U.S.C. 303(b)(8), adopted August 9, 1935, 49 Stat. 544. Detroit and Windsor are contiguous communities considered to be part of the same "commercial zone." *Verbeam v. United States*, 154 F. Supp. 431 (E.D. Mich. 1957), aff'd *per curiam*, 356 U.S. 676 (1958).

[26] The Part IV service of ACE's American subsidiary is beyond the scope of this proceeding as it merely delivers cargo to ACE's freight consolidation station in Romulus, Michigan, under a separate domestic bill of lading. It should be noted, however, that 49 U.S.C. 1018 prohibits Part IV forwarders from "employing or utilizing" any foreign commerce carriers and thereby establishing their own international through routes. The ICC also forbids its carriers (including Part IV carriers) from participating in joint rate/through route international transportation with NVO's. *Ex Parte 261*, 351 I.C.C. 490, 493 (1976).

[27] We find it significant that ACE now advertises an "ICC authorized" door-to-door service to the Far and Middle East as well as Australia. "Lump sum" door-to-door container rates are apparently being offered. See September, 1976, *Intermodal Container News*, at 110.

which motivated Congress generally to adopt the Shipping Act.[28] So long as ACE solicits and musters cargo in the United States and uses ICC exempt motor carriage to transport this cargo from the United States on a through route containing a significant transoceanic segment, ACE can and should be effectively regulated by this Commission. We do not perceive the ICC's limited regulation of the Romulus to Windsor, motor carriage as an obstacle to the exercise of our jurisdiction.[29] The joint exercise of ICC and FMC authority over a particular *person* does not constitute the type of "concurrent power" forbidden by Shipping Act section 33; that prohibition only prevents the two agencies from regulating the same commercial *activities* at the same time. *Alabama Great Southern Railroad Co. v. Federal Maritime Commission*, 379 F.2d 100 (D.C. Cir. 1967).

We recognize our present position could appear inconsistent with earlier statements interpreting our through route jurisdiction in different factual situations. For example, language in *Disposition of Container Marine Lines, supra,* if read in isolation, might be interpreted as disavowing all authority to regulate matters involving inland transportation.[30] Such an interpretation would be clearly erroneous. The Commission has long regulated more than the basic "port-to-port" movements of ocean carriers under Shipping Act sections 15, 16 and 17, and has prohibited ocean carriers from unfairly absorbing the inland transportation charges of ICC carriers. *E.g., City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955) and 5 F.M.B. 118 (1956), aff'd *sub nom., Pacific Far East Lines v. United States*, 246 F.2d 711 (D.C. Cir. 1957).

The true purpose of these previous descriptions of our jurisdiction as "port-to-port" was to disclaim any encroachment into the legitimate regulatory realm of the ICC at a time before the Commission and ICC had developed mutual procedures for the filing of joint through intermodal tariffs.[31] In no instance do such statements represent the actual holding

[28] This was the approach followed not long ago by the United States Court of Appeals in ruling that the Federal Trade Commission had authority to adopt substantive industry regulation. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). There the Court held, at 686:

> In determining legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute. . . .

[29] Only the health and safety regulations of 49 U.S.C. 304(1) apply to Part II motor carriers operating within "commercial zones." 49 U.S.C. 303(b).

[30] There the Commission stated:

> . . . we are inclined to agree with those intervenors which have maintained that the word "places" in section 18(b)(1) is not intended to include inland points because the jurisdiction of the Commission is only port-to-port (including services in terminal area . . .).

[31] Such an intention is apparent from a close reading of the *Sea-Land* decision cited by the Presiding Officer. The Commission rejected single-factor joint motor-water rates from Utah, Idaho and Montana to Honolulu because: (1) the ICC and FMC portions of the rate were not appropriately broken out; and (2) without such a break out it would have been necessary for the FMC to assert jurisdiction over the inland *portion* of the through rate when only the ICC had such authority. 11 F.M.C., at 142.

of the case, nor was the need for an *actual vessel call* at an United States port ever in issue.[32]

Inasmuch as ACE is a common carrier by water in foreign commerce within the meaning of section 1, it follows that ACE must file a tariff which fully complies with Part 536 of the Commission's Rules. Section 18(b) is unquestionably unclear when applied to a modern, intermodal operation such as ACE's. Yet, regardless of whether Detroit is a "port" within the meaning of section 18(b), or whether that section's "through route" language operates independently of the "to and from United States ports" language, there is a sound basis for requiring ACE to observe the same tariff filing practices as its competitors.

The legislative history of section 18(b) contains no indication that Congress intended to omit any class of section 1 carriers from tariff filing responsibilities, and, since the type of containerized intermodal service offered by ACE was unknown in 1961, the "to and from United States ports" language in the final version of the bill (H.R. 6775) adopted by the 87th Congress cannot reasonably be construed as a deliberate exclusion of foreign commerce carriers not physically calling at United States ports. Indeed, the probable explanation for changing the "between all points" language in the 87th Congress's H.R. 4299 and the version of H.R. 6775 reported by the House was the Federal Maritime Board's suggestion that this language be modified to make it clear that carriers need not file rates for carriage *between one foreign port and another foreign port.* Senate Committee on Commerce, *Index to the Legislative History of the Dual Rate Law,* Doc. No. 100, 87th Cong., 2d Sess. (1962), at 44–45, 132 and 218. This change was not considered a major amendment by the Senate, *id.,* at 219–225, was not discussed in the Conference Report, *id.,* at 444–446, and was not debated on the floor, *id.,* at 244, 246, 369, and 436–438. We therefore conclude that ACE is required by section 18(b) to file a tariff covering its through route transportation to Australia from Detroit.

Moreover, Part 536 is not jurisdictionally limited by section 18(b). Since 1961, the Commission's rule making authority has resided in Shipping Act section 43. This authority has been broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. *Pacific Coast European Conference v. Federal Maritime Commission,* 350 F.2d 197, 203–204 (9th Cir. 1965), *cert. denied,* 382 U.S. 958 (1965); *Alabama Great Southern Railroad Co. v. Federal Maritime Commission, supra,* at 103; *Outward Continental North Pacific Conference v. Federal Maritime Commission,* 385 F.2d 981 (1967); *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission,* 385 F.2d 981 (1967); *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission,* 337 F.2d 289,

[32] *Cf., Transshipment Agreement, Indonesia/United States, supra,* where the Commission *asserted* jurisdiction over "first" or connecting water carriers which did not themselves call at United States ports.

29–295 (2d Cir. 1964), *cert. denied,* 380 U.S. 910 (1965). The Commission's obligations to define and eliminate unreasonable preference and discrimination by ocean carriers pursuant to Shipping Act sections 16 First and 17 are sufficient to support the adoption of our Part 536 rules and their application to all foreign commerce carriers as defined in section 1.[33] See *Alabama Great Southern Railroad Co. v. Federal Maritime Commission, supra.*

Accordingly, it is ultimately found and concluded that ACE is, and since June 1972, has been, a common carrier by water in the foreign commerce of the United States subject to section 1 of the Shipping Act, 1916; that ACE has operated, and continues to operate, as such a carrier without having a tariff on file with the Commission; and, that ACE's operations without filing tariffs have violated, and continue to violate, section 18(b) of the Shipping Act, 1916, and section 536.16 of the Commission's Rules.

Wherefore, IT IS ORDERED, That Austasia Intermodal Lines, Ltd., American Container Express, Inc., and any subsidiary, affiliate, or division of either corporation employing the trade name "Austasia Container Express," CEASE AND DESIST from soliciting, extending, or holding out to the public any through service as a common carrier between the Detroit, Michigan, Commercial Zone and Australia until such time as "Austasia Container Express" shall file a tariff with the Federal Maritime Commission covering its through transportation between said locations which complies fully with Part 536 of the Commission's Rules, including section 536.16 thereof; and

IT IS FURTHER ORDERED, That this Order is hereby STAYED for thirty (30) days from the date of service indicated above in order to provide Austasia Container Express a reasonable opportunity to file its rates and charges in the format required by Part 536 of the Commission's Rules.

Vice Chairman Morse dissenting. I dissent and in so doing adopt the Initial Decision of Administrative Law Judge Norman D. Kline.

(S) JOSEPH C. POLKING,
Acting Secretary.

[33] Part 536 is plainly directed to all section 1 carriers. 46 C.F.R. 536.1; 536.16(b).

FEDERAL MARITIME COMMISSION

No. 75–31

CSC INTERNATIONAL, INC.

v.

WATERMAN STEAMSHIP CORP.

NOTICE OF ADOPTION

February 15, 1977

The initial decision on remand of Administrative Law Judge Charles E. Morgan was served in this proceeding January 17, 1977. No exceptions were filed. Notice is hereby given that upon consideration of the record in this proceeding the Commission has determined to adopt the initial decision except for the portion thereof relating to the application of the statute of limitations to this proceeding.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75-31

CSC INTERNATIONAL, INCORPORATED

v.

WATERMAN STEAMSHIP CORPORATION

Adopted February 15, 1977

Shipment, described as drums, chemicals, NOI (2 Amino-2-Methyl-1-Propanol), found properly rated and charged as chemicals, rather than detergents. Complaint dismissed.

William Levenstein for the complainant.

Temple L. Ratcliffe for the respondent.

INITIAL DECISION ON REMAND[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The prior initial decision found that the complaint was filed two years and one day after the cause of action accrued, and therefore that the complaint was barred. By Order on Remand served October 8, 1976, the Commission decided, by four-to-one vote, that the complaint was timely filed and that jurisdiction rested with the Commission. The said Order on Remand vacated the prior initial decision, and remanded the matter to the Administrative Law Judge for further proceeding and adjudication of the complaint on its merits. Inasmuch as the prior initial decision was vacated and because a party may plead lack of jurisdiction before a reviewing court, it appears advisable to comment on the circumstances of the filing of the complaint. In any event, as directed, the ultimate findings in this initial decision on remand will be concerned only with the merits of the complaint.

BACKGROUND. By formal complaint filed on Monday, August 18, 1975, the complainant alleged that it was overcharged $454.58 on a shipment described on the bill of lading as 64 drums chemicals NOI (2-Amino-2 Methyl-1-Propanol), ocean freight prepaid, shipped August 17, 1973, from New Orleans, Louisiana, destined to Keelung, Taiwan.

The shortened procedure was followed. Complainant sought to have

[1] This decision became the decision of the Commission February 15, 1977.

the shipment rated as detergents, instead of as chemicals. The shipment consisted of 17.15 measurement tons. The charges assessed, based on the contract rate on chemicals of $107.50 per ton, were $1,843.63, plus $6.47 for tolls and $17.84 for unloading. The charges sought by the complainant, based on the contract rate on detergents of $81 per ton, are $1,389.15, plus tolls and unloading. The rates are found in Far East Conference Tariff No. 25, F.M.C. No. 5.

The prior initial decision did not consider the alleged merits of the complaint, but found it barred by section 22 of the Shipping Act, 1916 (the Act), which provides that reparation may be awarded if the complaint is filed within two years after the cause of action accrued. This agency's jurisdiction is conferred only by statutes enacted by the Congress of the United States.

Notwithstanding that the written statutory law takes precedent over common law, and the unwritten common law applies only where there is no statute, the complainant on exceptions to the prior initial decision asked the Commission to apply a common law rule for the computation of the two-year statutory limitation period, so as to permit filing of the complaint on a succeeding business day when the last day of the statutory period fell on a Saturday, Sunday or legal holiday.

In addition, the complainant asked the Commission to assume statutory jurisdiction over the complaint in this matter because of the alleged hardship in filing the complaint within two years, when the Commission's offices were closed on Sunday, August 17, 1975, as well as on Saturday, August 16, 1975. The Commission stated in its order on remand that Sunday, August 17, 1975, was "the last day of the two-year limitation period," and that dismissal of the complaint under the circumstances would cause undue hardship.

Inasmuch as it was believed that the statute could not be amended by rulemaking, and since the two-year statute seemed to be without need for any interpretation, the prior initial decision pointed out that our Rules of Practice and Procedure necessarily were consistent with the two-year statutory period. Also the statute itself makes no reference to extensions for Saturdays, Sundays, or legal holidays.

The Commission considered these circumstances, and to avoid undue hardship, in the exercise of its discretion under the Rules of Practice and Procedure, waived pursuant to Rule 1(j) (46 CFR 502.10), the exception of Rule 5(c) (46 CFR 502.63), contained in Rule 7(a) (46 CFR 502.101), and concluded that the filing of the complaint on Monday, August 18, 1975, was timely. Vice Chairman Morse dissented for two reasons, one reason being that Congress said two years, not two-years and one day, and the other reason being that in his view there was no hardship, let alone undue hardship.

It is common knowledge that the Commission's offices are closed on Saturdays and Sundays, and for that matter after 5:00 p.m. on working weekdays. A reasonably prudent complainant or his attorney would act

accordingly and mail or file his complaint so that it would reach the Commission prior to a Saturday, Sunday or holiday two-year limitation period deadline. Lack of such foresight it is believed would condone carelessness rather than impose any undue hardship under the facts and circumstances of the present complaint which arose following an audit of freight bills by Ocean Freight Consultants, Inc., begun as early as or earlier than July 2, 1975.

Of further interest in this matter is the Commission's Notice of Proposed Rulemaking regarding GENERAL ORDER 16; DOCKET NO. 76-61, MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE (41 F.R. 51621; November 23, 1976). By this notice, among other matters the Commission is giving consideration to amending section 502.101 of the Rules of Practice and Procedure by deleting the words "except section 502.63 (Rule 5(c))" from the first sentence. By this amendment the Commission would relax the rule in all complaint proceedings, as it has done in the present proceeding, No. 75-31, so that all complainants will not be prevented from seeking relief merely because the last day of the period of limitation happens to fall on a day on which the Commission's offices are closed. In comments filed regarding this proposed rule, Sea-Land Service, Inc., opposes this proposed change which would disregard a Saturday, Sunday or holiday in calculating the two-year statute of limitations if such a day were the last day of the statutory period. Sea-Land said that the present section 22 of the Act was approved by Congress and cannot be changed in a rulemaking proceeding, but must be the subject of amending legislation. The Maritime Administration Bar Association also is of the view that the Commission has no authority to narrow or to extend the two-year statute of limitations.

While it is believed that the statute is not subject to interpretation, it is submitted respectfully that if the two-year statutory period for jurisdiction is deemed subject to interpretation because of incompleteness or vagueness of the statute, then any interpretation of the statute should err, if at all, on the side of limiting rather than of expanding jurisdiction.

THE MERITS OF THE COMPLAINT. Assuming, as the Commission has directed, that the complaint was timely filed and that jurisdiction rests in the Commission, the issue is what commodity was shipped. Was it chemicals, detergents, or something else?

As a general rule, the nature of the commodity shipped, not its purchase or sales price, nor the commercial demand for it, nor the use to which it is put, determines the freight rate which should be applied. The record in the present proceeding has been combed carefully to ascertain all the facts relative to the nature of the shipment here in issue.

The complainant is a corporation whose principal business is the manufacture and distribution of chemicals and chemical products. The consignee of the shipment is the Lidye Chemical Co., Ltd., in Taiwan.

In Docket No. 75-50, *Commercial Solvents Corporation International,*

Inc. v. Moore-McCormack Lines, Inc., wherein the complaint was dismissed by the Commission as untimely filed, report of the Commission served January 4, 1977, the same complainant as in the present proceeding shipped the same commodity as in the present proceeding, namely 2-Amino-2-Methyl-1-Propanol (hereafter for convenience sometimes called AMP). Also in No. 75–50, as in the present proceeding, the bill of lading described the shipment as "Drums Chemicals NOI (2-Amino-2-Methyl-1-Propanol)." Ordinarily a bill of lading description is neither conclusive nor binding in a determination of the legal freight charges. But where the consignor or shipper was the manufacturer of the articles shipped, the description in the bill of lading may not be ignored. *Gulf Shipbuilding Corp v. Southern Pac. Co.*, 286 I.C.C. 153 (154). We now turn to various other factors in evidence, other than the bill of lading description.

In Docket No. 75–50 the complainant also was charged the rate on chemicals. In Docket No. 75–50 the same complainant sought to be charged the rate on "Compounds, Surface Active (Wetting Agents or Emulsifiers)." In the present proceeding, No. 75–31, the same complainant contends that the shipment should be rated as Detergents, Liquid or Dry non-hazardous, N.O.S.

The commodity shipped, *AMP,* is listed in a chemical dictionary (attachment 5 to the complaint). There it is also known as isobutanolamine and Ch C(CH)NH CH OH. It has certain properties. It is a colorless liquid or a white crystalline solid; it is completely miscible in water at 20 degrees Centigrade; its specific gravity is 0.934 at 20/20 degrees Centigrade; its boiling point is 165 degrees Centigrade; its melting point is 30–31 degrees Centigrade; its flash point is 153 degrees Fahrenheit; it is combustible and has low toxicity.

The chemical dictionary lists *three uses* for *AMP, one,* as an emulsifying agent (in soap form) for oils, fats and waxes; *two,* as an absorbent for acidic gases, *and three,* in chemical synthesis.

The chemical dictionary also defines an *emuslifier* as a surface-active agent.

The chemical dictionary also defines an *emulsion* as a stable mixture of two or more immiscible liquids held in suspension by small percentages of substances called emulsifiers.

The chemical dictionary also defines *surface active agent* as any compound that reduces surface tension when dissolved in water or water solutions, or which reduces interfacial tension between two liquids, or between a liquid and a solid.

Also it is stated in the chemical dictionary that there are *three categories of surface active agents,* namely *one,* detergents, *two,* wetting agents, *and three,* emulsifiers. It is said that all three have the same basic chemical mechanism and *differ* chiefly in the nature of the surfaces involved.

By this definition of surface active agent (surfactant), as per attachment

7 to the complaint, *detergents and emulsifiers differ from one another* chiefly in the nature of the surfaces involved.

By attachment 4 to the complaint, the complainant in its "NP Technical Bulletin," advertising nitro paraffins, states that "AMP is a very efficient emulsifying agent for the emulsifiable polyethylenes and waxes used in today's floor polish formulations. . . . " "Better synthetic waxes, polymers, and modifiers when used with emulsifiers such as AMP contribute the properties needed to protect, preserve, and beautify the substrates to which the many polishes available today are applied."

Thus, it appears by the complainant's own exhibits or attachments to its complaint that it shipped a product advertised by it for use as an emulsifier for waxes in floor polishes.

The complainant so far as this record shows apparently does not advertise AMP as a detergent.

In Docket No. 75–50, the complainant contended that AMP was an emulsifying agent, so sold by the complainant. The finding in the initial decision in No. 75–50 was that the commodity shipped therein was in fact an emulsifier for waxes, and the complainant did not except to this finding. The initial decision in No. 75–50 was made on the merits of the complaint, and it was not adopted by the Commission because the Commission found that that complaint was untimely filed. In the Commission's decision in No. 75–50, a discussion of the merits of the case was unnecessary in view of the finding of lack of jurisdiction.

From the above evidence it is concluded that *one of the uses of AMP is as an emulsifier.* It is further concluded that by chemical definition *emulsifiers differ from detergents,* and therefore that AMP when used an an emulsifier is not being used as a detergent. It is further found that there is nothing of record which shows that AMP ever was used or intended to be used as a detergent.

Furthermore, one use of a product does not necessarily determine the transportation nature for tariff purposes of a commodity. In fact by chemical definition, AMP has uses as an absorbent for acidic gases. An absorbent is not a detergent. Another use of AMP, by chemical definition, is in chemical synthesis. These two uses do not show that AMP is a detergent.

In fact different rates on the same commodity dependent upon the use made of it would lead to unjust discrimination. *Atchison Leather Products Co. v. Atchison, T. & S.F. Ry. Co.,* 274 I.C.C. 328 (329).

The nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may be subsequently made of the material does not control *Sonken-Galamba Corporation v. Union Pac. R. Co.,* 145 Fed. (2d) 808 (812).

There is no better entrenched rule in the making of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it is put *Food Machinery Corp. v. Alton & S.R.,* 269 I.C.C. 603 (606).

Actually in the present proceeding, the use of the AMP made by the consignee, the Lidye Chemical Co., Ltd., in Taiwan is not shown. We apparently must rely on such data as is found in the chemical dictionary. It must be borne in mind, also, that the burden of proof rests on the complainant.

Official notice is taken that a detergent generally has been considered to be a substance or mixture which has cleansing action because of a combination of properties including lowering of surface tension, wetting action, emulsifying and dispersing action and foam formation, that ordinary soap is the best known example, and that a detergent now is coming to mean the synthetic variety in distinction to soap which is derived from natural fats and oils. (See page 344 of the Chemical Dictionary, attached to complainant's reply memorandum.) The purpose of a reply memorandum is to rebut existing evidence and arguments, rather than to introduce new evidence, but the definition of a detergent certainly is helpful to this record and therefore is noticed, and since complainant sought to introduce page 344, surely complainant cannot object to its notice.

It should be remembered that many surface-active agents do not possess detergent properties, and hence that the terms surface-active agent and detergent are not synonymous. (Attachment 7 to the complaint.) This finding also may be confirmed by official notice of page 497 of Van Nostrand's Scientific Encyclopedia (1958).

The chemical definition of AMP does not state that it has a cleansing action or that it is used as a cleansing agent.

The complainant attempts to counter its own attachment 5, definition of AMP, by reference to the definition of an emulsion in its attachment 6. From the definition of an emulsion in attachment 6, the complainant interprets it to say that all emulsifiers both natural and synthetic are known collectively as detergents. But the chemical dictionary says, "q.v.," see the definition of detergents. And as noted the definition of detergents, both natural and synthetic, states that they have a cleansing action. Page 344 of the Chemical Dictionary states that synthetic detergents are surface active agents and have structurally unsymmetric molecules containing both hydrophilic, or water-soluble groups and hydrophobic or oil-soluble hydrocarbon chains. We must, if we rely on the Chemical Dictionary, take the direct definition of AMP in the dictionary, rather than rely on some other definition of AMP obtained by convoluting definitions of other items, such as of emulsions, in the same dictionary.

As seen, one use of AMP is as an emulsifier. An emulsifier is only one type of surface-active agent. Whereas all detergents are surface-active agents, it is not true that all surface-active agents are detergents. This record does not show that AMP is a detergent or that it has a cleansing action, or that it is used as a cleansing agent.

In part, the complaint relies on the thin thread of the chemical definition

of AMP, attachment 5, wherein one of the uses of AMP is as an "Emulsifying" agent (in soap form for oils, fats and waxes) but this is a very thin thread indeed because the fact that AMP may be used as an emulsifying agent (in soap form) does not make it a soap. AMP in this use is an emulsifying agent.

The AMP here in issue was shipped by the complainant, a manufacturer of chemicals and a distributor of chemicals; the bill of lading described AMP as chemicals; the consignee was a chemical company; AMP is defined in a chemical dictionary; and one of the uses of AMP is in chemical synthesis.

From all of the above positive circumstances, and also because of the negative circumstance that the chemical dictionary states that detergents and emulsifiers differ, it is concluded that AMP is not a detergent and is in fact a chemical.

A search of the applicable tariff in this Far East Conference trade does not whow any rate on emulsifiers or emulsifying agents, and in any event that is only one use of AMP. Furthermore, the Far East Conference agrees that the respondent charged the proper rate and that AMP is strictly a chemical.

In addition, the classification and rating of AMP as a chemical is clearly in conformity with the classification of AMP contained in the Statistical Classification of Domestic and Foreign Commodities Exported from the United States, U.S. Schedule B, which is published by the U.S. Department of Commerce. (See Exhibit E attached to respondent's memorandum, page 75, section 5. Chemicals, schedule number 512.0945.

From all of the above facts and circumstances, it is found and concluded that the shipment of AMP here in issue properly was rated and charged as chemicals.

The complaint is dismissed.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
January 17, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-18

DOW CHEMICAL INTERNAIONAL, INC.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

A proper tender of cargo by a shipper to a carrier consists of an unconditional offer to deliver the cargo, coupled with a manifested ability to carry out that offer, and production of the cargo at the time and place of the offer.

Where the shipper presented itself with its cargo at the gate to the carrier's dock, and received there both permission to enter onto the dock and directions to that portion of the dock known as the container yard; and, where the shipper, with its cargo, proceeded to that container yard, there offering to the carrier the documents identifying its cargo, the shipper tendered its cargo to the carrier at the container yard, not the gate givng entry to the dock.

Where a handling charge applies to cargo tendered at the container yard but not the dock, and the shipper tenders cargo at the container yard located wholly within the dock, the tariff containing the handling charge is ambiguous as to the applicability of the handling charge.

Ambiguous tariffs are to be construed against the carrier drafting the tariff, but, such construction must be fair and reasonable.

Where some carriers participating in a tariff have container yards located on their respective docks, and other carriers participating in that tariff have container yards off of their respective docks, and that tariff provides, generally, for a handling charge on cargo tendered at the container yard or the dock, but specifically exempts cargo tendered at the dock from the handling charge, the word "dock" in the exemption includes the container yard located wholly within the dock.

Where the shipper tendered cargo to the carrier at the carrier's container yard, located wholly within the carrier's dock, the cargo so tendered is exempt from the handling charge cargo tendered to the carrier's dock.

Robert R. Tierman and *Peter M. Nemkov* for Complainant, Dow Chemical International, Inc.

Edward D. Ransom and *Barbara H. Buggert* for Respondents, American President Lines, Ltd.,; Barber Lines A/S; Pacific Far East Line, Inc.; Sea-Land Service, Inc.; United States Lines, Inc.; Zim Israel Navigation Company, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Showa Shipping Company, Ltd.; States Steamship Company; and Intervenor, Pacific Westbound Conference.

REPORT

February 22, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners)*

This is a complaint proceeding. The Complainant, Dow Chemical International, Inc., is engaged principally in the overseas marketing of chemicals, plastics, pharmaceuticals, and related items. Respondents are nine common carriers by water, members of the Pacific Westbound Conference.[1] *The Pacific Westbound Conference intervened in the proceeding.*

The complaint seeks reparations from Respondents totalling $20,438.43, alleged to be the total amount of handling charges assessed Complainant by Respondents during the period August 13, 1973 to April 1, 1974, which handling charges are alleged to be in excess of those authorized by the applicable tariff, to wit: the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8.

Complainant alleges that the Complainant tendered shipper-packed containers to Respondents at their respective docks, and that the applicable tariff did not authorize the assessment of handling charges on shipper-packed containers tendered to the carriers' docks. The overcharges are alleged to be in violation of section 18 of the Shipping Act, 1916. In Respondents' answer, Respondents admitted all of the pro forma allegations contained in the complaint, but denied that Complainant tendered all cargo in shipper-packed containers to Respondents at their respective docks. To the contrary, Respondents alleged that Complainant's cargo, in shipper-packed containers, was tendered to Respondents at their respective container yards (CY's), and that the applicable tariff, the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8, authorized the assessment of handling charges on shipper-packed containers tendered to the carriers' container yards. Respondents denied that section 18 of the Shipping Act, 1916, had been violated.

The matter was assigned to an administrative law judge for hearing and decision. Administrative Law Judge John E. Cograve issued an Initial Decision, wherein the complaint was dismissed. Complainant excepted to that decision, Respondents replied, and the Commission heard oral argument. The Initial Decision is reversed, and this Report is submitted in lieu thereof.

Complainant and Respondents entered into a stipulation of facts, and put in evidence interrogatories, the answers thereto, requests for admission, and the answers thereto, all of which constitutes the evidence of record in this proceeding.

[1] American President Lines, Ltd.; Barber Lines, A/S; Pacific Far East Line, Inc.; Sea-Land Service, Inc.; United States Lines, Inc.; Zim Israel Navigation Company, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Showa Shipping Company, Ltd.; and States Steamship Company.

All of the Respondents herein are common carriers by water engaged in transportation from U.S. Pacific Coast ports to ports in one or more of the following places: Japan, Hong Kong, Manila, the People's Republic of China, Taiwan, South Korea, Vietnam, and Thailand. At all times between August 13, 1973 and April 1, 1974 each Respondent was a member of the Pacific Westbound Conference, and party to the Local Freight Tariff No. 3–FMC–8, published by that Conference.

In the period from August 13, 1973 to April 1, 1974 Complainant made 147 separate shipments, on the vessels of Respondents, from the Pacific Coast of the United States to destinations in the Far East, including Japan, Hong Kong, Manila, and Kaohsiung and Keelung in Taiwan. Those 147 shipments were divided among Respondents as follows:

Respondents	*Number of Shipments*
American President Lines, Ltd.	90
Barber Lines, A/S	1
Pacific Far East Line, Inc.	4
Sea-Land Service, Inc.	41
United States Lines, Inc.	2
Zim Israel Navigation Company, Ltd.	4
Kawasaki Kisen Kaisha, Ltd.	1
Showa Shipping Company, Ltd.	2
States Steamship Company	2

Each of those shipments consisted solely of containers packed by Complainant. The tariff applicable to each of those shipments was the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8, in which each Respondent participated, and by which each Respondent was bound. All rates, rules, regulations, and charges applicable to each of those shipments were contained in that tariff.

In addition to the nine carriers respondent in this proceeding, several other carriers are members of the Pacific Westbound Conference, and participate in the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8.

Complainant shipped the shipments identified above from several ports on the Pacific Coast of the United States. Those ports were San Francisco, Oakland, Los Angeles, San Pedro, and Long Beach. Each Respondent loaded Complainant's cargo at one or more of those ports during the period from August 13, 1973 to April 1, 1974.

Respondents and the several other members of the Pacific Westbound Conference conduct their common carrier operations in the several ports on the Pacific Coast of the United States. Each of those ports identified above were designated by the carriers in conference as terminal ports. In each terminal port each carrier, if it served that port, had one terminal dock. That terminal dock encompassed the pier or wharf, backup spaces, administrative offices, parking lots, and other facilities used in the conduct of the ocean common carriage business. The terminal dock was usually

enclosed by a fence. The carriers who were members of the Pacific Westbound Conference agreed among themselves that each carrier could designate a location within the terminal port as that carrier's container yard. The container yard could have been located within the carrier's terminal dock, or at some place off of the carrier's terminal dock, but within the terminal port. The members of the conference were not required to designate a container yard, but, if a carrier designated a container yard, then that container yard was the one location where the carrier was permitted to receive containers for shipment which had been packed by the shipper. If a carrier did not designate a container yard, then that carrier could recieve shipper-packed containers only at its terminal dock. At all times between August 13, 1973 and April 1, 1974, each Respondent had a container yard within their respective terminal docks.

The carriers also agreed among themselves that each carrier could receive cargo from shippers, to be packed by the carrier into containers, both at the terminal dock or at some place other than the terminal dock, but within the terminal port. If the carrier had established a place other than the terminal dock for the receipt of cargo to be packed into containers by the carrier, that place was designated as the container freight station.

For each of the shipments identified above Complainant followed the same procedure. Complainant packed a container with its cargo at one of its plants. A freight forwarder was selected to coordinate the movement of that container from the plant to the Respondent for on-carriage to the overseas destination. The container was transported by a motor common carrier, under an inland bill of lading, from Complainant's plant to Respondent's terminal dock. At the gate giving entrance to Respondent's terminal dock the motor common carrier was issued a gate pass by the security guard, and then directed by that guard to the gate giving entrance to Respondent's container yard. At the container yard gate the motor common carrier presented the inland bill of lading to Respondent's clerk, who issued a receipt for the container to the motor common carrier. The clerk then directed the motor common carrier to a point within the container yard where the container was removed from the chassis of the motor common carrier.

Respondents assessed and collected from Complainant, for each of the shipments identified above, a handling charge at the rate of $1.75 per ton. The totals of the handling charges assessed and collected from Complainant by each Respondent are as follows:

Respondent	*Handling Charges*
American President Lines, Ltd.	$ 9,841.79
Barber Lines, A/S	249.90
Pacific Far East Line, Inc.	780.94
Sea-Land Service, Inc.	8,313.63
United States Lines, Inc.	71.40

Respondent	*Handling Charges*
Zim Israel Navigation Co., Ltd.	428.40
Kawasaki Kisen Kaisha, Ltd.	357.00
Showa Shipping Company, Ltd.	145.93
States Steamship Company	249.44
Total	$20,438.43

Each Respondent asserts the Pacific Westbound Conference Local Freight Tariff No. 3–FMC–8 as the basis for the assessment and collection of those handling charges.

That tariff contained many rules pertaining to the carriage of cargo by Respondents and the other members of the Conference. Among those rules were two of particular applicability to the matter at issue in this proceeding, *i.e.*, Rules Nos. 70B and 19.

Rule 70B related to cargo carried in containers to Far East ports, including Japan, Hong Kong, Manila, and Kaohsiung and Keelung in Taiwan. As originally stated in the tariff, on March 15, 1969, that Rule provided that, "Shipper packed containers tendered to carrier at his CY or dock are not subject to the handling charge or container service charge." (Rule No. 70B1 (a)). On May 9, 1973 that Rule was changed by the addition of the words "provided in Rule No. 19." As so changed, the Rule provided that, "Shipper packed containers tendered to carrier at his CY or dock are not subject to the handling charge or container service charge provided in Rule No. 19." On August 13, 1973 the Rule was again changed so as to delete the words "not" and "or container service charge", and to add the word "as". As so changed, the Rule provided that, "Shipper packed containers tendered to carrier at his CY or dock are subject to the handling charge as provided in Rule No. 19." The Rule was not further changed until April 1, 1974. The word "dock", as used in that Rule, meant terminal dock. The abbreviation "CY", as used in that Rule, meant "the location designated by carrier in the port terminal area where (1) the carrier assembles, holds, or stores containers; and (2) where containers packed with goods are received or delivered." (Rule No. 70(3))

Rule No. 19 related to handling charges at United States loading ports. That Rule provided generally that, for a fee, the carrier would handle cargo from places alongside the ship and places on the terminal to the end of the ship's tackle. (Rule No. 19(a) and (b)). The Rule also exempted several categories of cargo from the handling charge, including cargo handled directly by the ship's tackle and cargo moving directly to the ship's hold by gravity or mechanical conveyor. (Rule No. 19(c) 1 through 5). The Rule also contained an exemption for certain containerized cargo. (Rule No. 19(c)6). From January 1, 1973, at least, that last exempting provision was as follows:

The Handling Charge will not apply—

6—On cargo tendered at Container Yard (CY), Container Freight Station (CFS) or carrier's dock and moving under the provisions of Rule No. 70(B). (See Rule 70(B), paragraph 1(b), for container service charge.)

On August 13, 1973 that provision was changed so as to delete the phrase "Container Yard (CY),". As so changed, the provision was as follows:

The Handling Charge will not apply—

6—On cargo tendered at Container Freight Station (CFS) or carrier's dock and moving under the provisions of Rule No. 70(B). (See Rule 70(B), paragraph 1(b), for container service charge.)

The Rule was not further changed until April 1, 1974. The "Rule 70(B), paragraph 1 (b)," referred to in Rule No. 19(c)6, was Rule No. 70B1.(b), which provided for the assessment of a container service charge of varying amounts on cargo parked into containers by the carrier.

Complainant was assessed the handling charge on all of its shipper-packed containers shipped via Respondents on and after August 14, 1973. On October 10, 1973 Complainant communicated to the Pacific Westbound Conference its objection to the assessment of the handling charge. Thereafter, the Pacific Westbound Conference filed with this Commission an amendment to the exempting provision of Rule No. 19(c)6 so as to provide that the handling charge would not apply on "cargo tendered at carrier's Container Freight Station (CFS) or dock for packing into containers by carrier under the provisions of Rule No. 70(B). (See Rule 70(B), paragraph 1(b), for application of container service charge.)" That amendment was to have been effective on October 17, 1973, and recited that it was filed for clarification of the language. The amendment was rejected by the Bureau of Compliance of this Commission because it resulted in an increase in cost to the shipper, and had not been filed in compliance with the notice requirements of the Shipping Act, 1916. After the rejection of that amendment, Respondents continued to assess and collect the handling charges from Complainant. Effective on April 1, 1974, the handling charge was deleted from the tariff, and a Terminal Receiving Charge was instituted in its place.

In the Initial Decision the Presiding Officer found that Complainant delivered its containers to Respondents' container yards and that the interpretation of Respondents' tariff proffered by Complainant was unfair and unreasonable, bordering on the absurd. As a consequence, the Presiding Officer rejected that interpretation, and dismissed the complaint.

The Presiding Officer failed to decide whether or not Respondents' tariff was ambiguous, and ignored an alternative interpretation of the tariff proffered by Complainant. In so doing, the Presiding Officer erred.

Complainant made two arguments to the Presiding Officer. Complainant first argued that, since, on each shipment, Complainant presented itself at the gate giving entrance to the carrier's terminal dock with the container, and there offered to deliver the container to the carrier, Complainant tendered its shipper-packed container to the carrier at that gate. Complainant argued that at all times after its arrival at the gate to the carrier's terminal dock Complainant was under the direction and control of the carrier, and that it was the carrier who caused the container to be moved

to the container yard, located wholly within the terminal dock. Consequently, argued Complainant, tender was made to the carrier at the gate giving entrance to the terminal dock.

Complainant's second argument was that, since, for each shipment at issue in this proceeding, the carrier's container yard was located wholly within its terminal dock, Complainant's tender of its shipper-packed container to the carrier at the carrier's container yard was tender at the carrier's terminal dock within the meaning of the tariff.

Respondents argued that Complainant tendered its shipper-packed containers to Respondents at their container yards. According to Respondents, a tender is complete when the tenderor offers to deliver the cargo, relinquishes control over the cargo, and has nothing further to do to effectuate deliver of the cargo. Under such a definition of tender, according to Respondents, Complainant tendered its cargo at Respondents' container yards, because it was only at the container yards that the Complainant offered to deliver, and relinquished control over, the cargo.

Respondents rejected the second argument of Complainant by asserting that Complainant was estopped from arguing that tender at the container yard was tender at the dock within the meaning of the tariff because Complainant has admitted that, if the cargo was tendered at the container yard, the handling charge was properly assessed against Complainant.

Respondents further argued that their tariff was not ambiguous because the tariff provisions were clear on their face, the terms used therein were defined in the tariff, and because a fair and reasonable construction must be given to the tariff.

Complainant tendered its shipper-packed containers to Respondents at their respective container yards. At the common law a tender consists of an unconditional offer to perform, coupled with a manifested ability to carry out the offer, and production of the subject matter of the tender. *Collins v. Kingsberry Homes Corporation,* 243 F. Supp. 741 (N.D. Ala. 1963), *aff'd.,* 347 F.2d 351 (5th Cir. 1965). This Commission's decisions regarding tender for delivery by an ocean common carrier are only particular applications of the general common law rule, and contain each of the elements enunciated in *Collins, above.* Contrary to the argument of Complainant, the evidence of record in this proceeding does not support a finding that Complainant offered to deliver its shipper-packed containers to each Respondent at the gates giving entrance to each Respondent's terminal dock. Complainant arrived at that gate, was issued a gate pass, and was directed to the container yard. That sequence of events does not constitute an offer to deliver. At the gate giving entrance to the container yard of Respondent, Complainant offered to Respondent the inland bill of lading documenting the shipper-packed container of Complainant. That act constituted an offer to deliver the container. Complainant had the container there at the gate, and had there the ability to deliver the container to Respondent. Thus, Complainant tendered its shipper-packed container to each Respondent at the gate giving entry to each Respond-

ent's container yard, not at the gate giving entrance to each Respondent's terminal dock.

The determination of the geographic locations where Complainant tendered its shipper-packed containers to Respondents does not resolve the dispute in this proceeding. It is necessary to also determine whether or not Respondents' tariff was ambiguous, and, if so, the correct construction of that tariff.

In this regard, contrary to the argument of Respondents, Complainant was not estopped by its admission, that the handling charge was properly assessable on cargo tendered to Respondents at their container yards, from advancing its second argument that tender at the container yards was tender at the docks within the meaning of Respondents' tariff. Complainant's admission can be reasonably read only to mean that the handling charge was properly assessable against cargo tendered at the container yard, within the meaning of Respondents' tariff.

The Commission finds that Respondents' tariff was ambiguous in regard to the assessment of the handling charge, and that a fair and reasonable construction of that tariff which is favorable to Complainant results in a finding that Complainant tendered its shipper-packed containers to Respondents at their respective docks, within the meaning of the tariff.

Respondents' tariff was ambiguous. Prior to August 13, 1973, Rule No. 70B1.(a) of Respondents' tariff provided that shipper-packed containers tendered to the carrier at the container yard or the dock were not subject to the handling charge provided in Rule No. 19. At the same time Rule No. 19(c)6 provided that cargo tendered to the carrier at the container yard, the container freight station, or the dock, and moving under the provisions of Rule No. 70B, was exempt from the handling charge imposed by Rule No. 19. Effective on August 13, 1973, and continuing to April 1, 1974, the rules were changed. During that period Rule No. 70B1.(a) provided that shipper-packed containers tendered to the carrier at the carrier's container yard or dock *were* subject to the handling charge, *as provided in Rule No. 19*. The shipper was, then, by Rule No. 70B1.(a) referred to Rule No. 19 to determine when the handling charge was to apply. As changed, Rule No. 19(c)6 provided that the handling charge did not apply to cargo tendered to the carrier at the carrier's container freight station or dock, and moving under the provisions of Rule No. 70B. Cargo moving under the provisions of Rule No. 70B included shipper-packed containers and cargo to be packed into containers by the carrier. Where, as here, the container yard of the carrier was located wholly within the dock of the carrier, and, where, as here, the shipper tendered the cargo to the carrier at that container yard, a problem is encountered. Should the handling charge have applied because the cargo was tendered at the container yard, or should the handling charge not have applied because the cargo was tendered at the dock? The interrelationship of Rules No. 70B1.(a) and 19(c)6 was ambiguous, and the tariff of Respondents must be construed.

It is now well settled that ambiguous tariffs are to be construed against the carrier drafters thereof, but, that such construction must be fair and reasonable. *Thomas G. Crowe, etal v. Southern Steamship Company, et al.*, 1 U.S.S.B. 145 (1929); *Rubber Development Corporation v. Booth Steamship Company, Ltd., et al.*, 2 U.S.M.C. 746 (1945).[2]

In this case Respondents argue that since all the words used in the tariff were defined in the tariff, the tariff was not ambiguous. But, at the same time, Respondents assert that the tariff contained a redundancy. That is, Respondents assert that, in Rule No. 70B1.(a), in the phrase "CY or dock", where the CY was located within the terminal dock, the word "dock" redundantly referred to that portion of the terminal dock wherein the CY was located.

Complainant, on the other hand, argues that where the CY was located within the terminal dock, delivery to the CY was delivery to the dock, within the meaning of the tariff.

The tariff at issue here, Pacific Westbound Conference Local Freight Tariff No 3–FMC–8, applied to not only the Respondents in this proceeding but to all of the other carriers who were members of the Pacific Westbound Conference. While all of the Respondents in this proceeding had a container yard located on their respective terminal docks, not all of the members of the PWC did so. Some of the members of the Conference maintained container yards at locations outside of their respective terminal docks.[3]

The different locations of the container yards provides the key to a construction of the tariff which is fair and reasonable, and which assigns meaning to each of the words in the tariff. Respondents' assertion that the word "dock" was redundant in Rule No. 70B1.(a) is rejected, because the construction of a tariff which gives meaning to all the words used in the tariff is to be preferred over one which renders words meaningless.

The abbreviation "CY", as used in Rule No. 70B1.(a), was specifically defined in Rule No. 70 as the location where the carrier received shipper-packed containers. The word "dock", as used in Rule No. 70B1,(a), was

[2] The cases cited by Respondents, *Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corporation*, 8 F.M.C. 137 (1964), and Complainant, *The Gelfand Manufacturing Company v. Bull Steamship Line, Inc.*, 1 U.S.S.B. 169 (1930), are clearly distinguishable from the case at issue here. In *Buckley* the asserted ambiguity in the tariff was alleged to be in the distinction, or lack thereof, between the words "bales" and "units" in the following tariff provision:

Item 269 *Charges for Wharfage and Handling* (in cents per ton of 2,000 pounds).

Wood Pulp, in bales 1,000 pounds and over, 69 ¢
In units under 1,000 pounds 95 ¢

In that case, it was apparent on the face of the tariff that the word units meant bales, resulting in no ambiguity. Consequently, the Commission denied reparations to Complainant.

The *Gelfand* case was not so much an ambiguity case as it was a definitional one. The question presented in *Gelfand* was whether or not a rate for canned goods included foodstuff preserved in glass jars. The Commission found that the commonly understood definition of car included glass jars, and that the carrier's classification system defined can so as to include glass jars. Consequently, the Commission awarded reparations to Complainant.

[3] Respondents, in their answers to interrogatories, stated that the CY ". . . in most instances . . ." was located on the terminal dock. From that statement the Commission infers that some of the members of the Pacific Westbound Conference maintained container yards at locations other than on their respective terminal docks.

not defined in that rule. However, Respondents have admitted that the word "dock" meant terminal dock, which was that area, usually enclosed by a fence, wherein the carrier conducted its common carrier operations. The dock included, the pier or wharf, administrative offices, parking lots, backup areas, and, in some cases, the container yards.

It is clear that Respondents intended to subject some shipper-packed containers to the handling charge provided in Rule No. 19.[4] The members of the Pacific Westbound Conference which maintained container yards at a location off ot their respective docks would have incurred expenses associated with handling containers from those container yards to the end of ship's tackle on the pier located within their respective docks. It is to be expected that those costs would have been greater, all other things being equal, than the costs, incurred by those members of the Conference which maintained container yards on their respective docks, for handling containers from the nearer container yard to the end of ship's tackle on the pier within the dock. It would not have been unreasonable, then, for cargo tendered at the distant container yard to be assessed a handling charge, while cargo tendered at the nearer container yard to not be assessed a handling charge.

The other exemptions in Rule No. 19 were related to reduced costs on the part of the carrier. The first five exemptions dealt with categories of cargo on which the handling was minimal. Those categories included cargo lifted directly by the ship's tackle from lighters or railroad cars located alongside the ship, and cargo moving directly into the hold by mechanical means. A similar cost relationship is discovered in the exemption for cargo tendered to the carrier for packing into containers by the carrier. Such cargo was subjected to a container service charge, approximating $3.00 per ton, by Rule No. 70B1.(b).

Therefore, the Commission finds that the word "dock", as used in Rule No. 70B1.(a) and Rule No. 19(c)6, meant the terminal dock, and included any container yard located within the terminal dock.

As so interpreted, Rules No. 70B1.(a) and 19(c)6 related reasonably one to the other. Effective on August 13, 1973, Rule No. 70B1.(a) provided that shipper-packed containers tendered to the carrier at the carrier's container yard, be it on dock or off dock, or to the carrier's dock, were subjected to the handling charge, *as provided in Rule No. 19.* The shipper was, therefore, by Rule No. 70B1.(a), referred to Rule No. 19 to determine the applicability of the handling charge. In Rule No. 19(c)6 the shipper would have discovered that cargo moving under the provisions of Rule No. 70B, which applies to both shipper-packed containers and carrier-packed containers, was exempt from the handling charge if that cargo was tendered to the carrier at the carrier's container freight station or the carrier's dock. Since the word "dock" included an

[4] Respondents refused to answer questions, propounded by Complainant, regarding the purposes of the changes in the Rule effected on August 13, 1973 and April 1, 1974. The record is, therefore, without direct evidence regarding the purposes of these rule changes, leaving the discernment of those purposes to inference.

on dock container yard, tender of shipper-packed containers to the carrier at the carrier's on dock container yard, would have been tender to the carrier at the carrier's dock, within the meaning of Rule No. 19(c)6, and such cargo would have been exempt from the handling charge. However, cargo tendered to a carrier at the carrier's off dock container yard would have been subject to the handling charge.

Because Complainant tendered its shipper-packed containers to Respondents at their respective on dock container yards, Complainant tendered its shipper-packed containers to Respondents at their respective docks, as that word is used in Rule No. 19(c)6. Complainant's cargo was, therefore, exempt from the handling charge provided for in Rules No. 70 and 19. Because Respondents assessed against, and collected from, Complainant a handling charge of $1.75 per ton on that cargo so tendered, Respondents violated section 18(b)(3) of the Shipping Act by charging and collecting a greater compensation for a service in connection with the transportation of property than the charge specified in the applicable tariff on file with this Commission. Complainant has been injured by that violation in the amount of $20,438.43. Each Respondent will be required to return to Complainant those amounts collected by that Respondent from Complainant in excess of the amount authorized by the applicable tariff. An appropriate order will be entered.

Vice Chairman Clarence Morse, dissenting.

I dissent.

The parties hereto stipulated pursuant to Rule 10(v) of the Commission's Rules of Practice and Procedure that:

14. The tariff provisions relevant to this proceeding are Rule 1, Rule 5, Rule 19(c)(6), Rule 70, and Rule 70(B) and relevant revisions thereto. Authentic and genuine copies of tariff pages which contain these provisions are included in attachments to the Amended Complaint or in Answers and Objections of Respondents to Interrogatories and Requests for Admissions of Complainant dated August 2, 1974.

15. Under date of May 9, 1973 Pacific Westbound Conference amended Rule No. 70(B) of said tariff (24th Revised Page 53) to read in significant part as follows:

"Shipper packed containers tendered to carrier at his CY or dock are *not* subject to the handling charge or container service charge provided in Rule No. 19." (Emphasis added)

"(A)" "(Shipper packed containers tendered to carrier at his CY or dock *are* subject to the handling charges provided in Rule No. 19.)" (A) Effective August 13, 1973.

The statement in parenthesis was the amendment inserted in the tariff in May so as to provide 90 days notice of its effectiveness on August 13, 1973 as noted in the tariff with the symbol "(A)". Complainant received the notice of this change in compliance with the General Commodity Contract Rate Agreement. Subsequently the language which existed prior to the May 9th amendment and which continued in effect until August 13, 1973 was removed, and this section of the tariff was amended (28th Revised Page 53, Effective September 12, 1973) to read:

"Shipper packed containers tendered to carrier at his CY or dock are subject to the handling charge as provided in Rule No. 19."

This language remained unchanged during the period covered by the Complaint.

16. Under date of May 15, 1973 Pacific Westbound Conference amended Rule No. 19(c)(6) of said tariff (5th Revised page 31) to read in significant part as follows:

"The Handling Charge Will Not Apply—On cargo tendered at Container Yard (CY) *(Container Yard (CY) to be deleted 8/13/73)*, Container Freight Station (CFS) or carrier's dock and moving under the provisions of Rule No. 70(B).

The amendment was the underscored language [sic] not to be effective until 8/13/73. Complainant received the notice of this change in compliance with the General Commodity Contract Rate Agreement.

17. After Dow raised a question (by telex to PWC dated October 10, 1973) as to Dow's interpretation of this provision, PWC filed a revised Rule No. 19(c)(6) of said tariff (6th Revised Page 53, Effective October 17, 1973) to read in significant part as follows:

"The handling charge will not apply—On cargo tendered at carrier's Container Freight Station (CFS) or dock *for packing into containers by carrier* under the provisions of Rule No. 70(B)." (Emphasis added)

Sixth Revised Page 31 was rejected by the FMC Bureau of Compliance on the contention that it was not just a clarification but resulted in an increase. Accordingly, PWC re-published Rule No. 19(c)(6) (7th Revised Page 31, Effective November 12, 1973) in the same form as the Rule appeared at 5th Revised Page 31 filed May 15, 1973.

18. As of April 1, 1974 handling charges as had previously been in the tariff were eliminated. The Amended Complaint is not concerned with provisions of the tariff in effect April 1, 1974 and thereafter.

19. Rule 70(3) of said tariff (Original Page 48, Effective March 5, 1969, and in effect at all times pertinent to the Amended Complaint) defines the term container yard (CY) as follows:

"(3) *Container Yard* (CY): The term "container yard" (CY) means *the* location designated by carrier in the port terminal area where (1) the carrier assembles, holds or stores containers *and* where containers packed with goods are received or delivered." (Emphasis added)

20. By Rule No. 5 in effect at all times pertinent to the Amended Complaint, each carrier declares an assigned terminal dock in each port served. (6th Revised Page 27, Effective May 13, 1973.)

21. By Rule No. 1 in effect at all times pertinent to the Amended Complaint each carrier may have in each terminal port "*one* location in the port terminal area designated as their CY *where* containers packed with goods may be received." The one CY may be either off-dock or on-dock (4th Revised Page 23, Effective January 10, 1972.) (Emphasis added)

22. During all times pertinent to the Amended Complaint the CY of each of the respondents named in the Amended Complaint in each of the ports referred to was located within their respective terminal docks.

Each shipment referred to in the Amended Complaint was transported to the respective ocean carrier's terminal dock by a motor common carrier selected by the shipper. Said common carrier with possession of the inland bill of lading on arrival at the entrance to the ocean carrier's terminal dock was issued a gate pass and then directed by a security guard to the container yard gate. At the container yard gate the common carrier presented a document or documents (including the inland bill of lading) identifying the container being delivered, a receipt (including in most cases the inland bill of lading) was issued to the said motor common carrier executed on behalf of the ocean carrier and the motor common carrier was directed to a location in the container yard for removal of the container.

Summarizing the foregoing, the *ports* served are identified. The assigned *terminal dock* within each port is identified in writing to the Conference Chairman. In addition, each carrier (1) must declare in writing to the Conference Chairman when it elects to have *an off-dock CFS*

where loose cargo may be received for stuffing into a container in addition to its on-dock facilities for so stuffing loose cargo into containers (and as to the latter on-dock facility no notice need be given to the Conference Chairman other than the elsewhere required notice of the location of the carrier's "assigned terminal dock"), and (2) each carrier also may have within the entire port terminal area either *one off-dock CY* or *one on-dock CY* where shipper-packed containers are received. Thus the CY authorization is more restrictive than the CFS authorization. The end result is that loose cargo may be received and stuffed into containers either at the off-dock CFS (if any) or at the dock area itself, but *shipper-packed containers may be received only at the single Container Yard in the port terminal area* whether the CY is located in the terminal dock area of whether the CY is located outside that terminal dock area but within the port terminal area.

From the foregoing it is clear that the dispute arises because Tariff Rule 70(B)(1)(a) provided that on and after August 13, 1973, handling charges under Rule 19 would be assessed on *shipper-packed containers* tendered to carrier at his "CY or dock", whereas Tariff Rule No. 19(c)(6) was amended, effective August 13, 1973, to provide that the exemption from paying the handling charge, which exemption theretofore applied to "*cargo*" tendered at CY, CFS or carrier's dock and moving under the provisions of Rule No. 70(B), would thereafter apply only to "cargo" tendered at CFS or carrier's dock and moving under the provisions of Rule No. 70(B). In other words, after August 13, 1973, while Rule No. 70(B) provided that "shipper packed containers" tendered to carrier at CY or dock *would* pay a handling charge, nevertheless, after August 13, 1973, Rule No. 19(c)(6) provided that "cargo" tendered at CFS or carrier's dock *would not* pay the handling charge.

In my opinion, the majority's interpretation does not take into consideration all provisions of the tariff or other relevant factors, including practices in the ports which restrict the areas within the ports to which shipper-packed containers may be tendered. I agree that tariff ambiguities should be resolved in favor of the shipper; nonetheless, the totality of the tariff (*Storage Practices at Longview, Wash.*, 6 F.M.B. 178 (1960) at 182) and all pertinent facts must be considered in arriving at a reasonable interpretation of the tariff (*Thomas G. Crowe* v. *Southern S.S. Co.*, 1 U.S.S.B. 145 (1929) at 147). In the case before us there are other tariff provisions and other facts which negate or at least clarify the ambiguity which seems to result from comparing only Rules Nos. 70B(1)(a) and 19(c)(6).

First there is Tariff Rule No. 70(3) which defines Container Yard as:

> . . . the location designated by carrier in the port terminal area where . . . containers packed with goods *are* received or delivered.

Also Tariff Rule 1(a) contains a provision which permits a carrier to designate locations for the receipt of non-containerized cargo and for the

receipt of shipper-packed containers. That rule specifies that it is the CY "where containers packed with goods may be received".

There is no tariff rule which designates the *dock* as a separate and unique place, separate from the CY, as a place where shipper-packed containers could be recieved. The majority contends, however, that because the dock is mentioned in the cargo handling rules (Rules Nos. 19(c)(6) and 70B(1)(a)) there must be such a place available for delivery of packed containers. If there is not, it is contended, then the tariff is either confusing or fraudulent.

To arrive at such a conclusion requires a reading of only selected tariff rules. When Rules Nos. 19(c)(6) and 70B(1)(a) are read with Rules Nos. 1(a) and 70(3), the reasonable construction is that shipper-packed containers will be received only at the CY and that subsequent to August 13, 1973, there would be a handling charge on such containers.

This interpretation is reinforced by a further reading of the tariff's language. Rule No. 70B(1)(a), in applying the handling charge, refers to "shipper packed containers". Rule No. 19(c)(6) refers to "cargo". That these are two separate and distinct things is evident from the two rules.

Rule No. 19(c)(6), prior to August 13, 1973, exempted three types of *cargo* from the handling charge:

(1) cargo tendered at the CY,
(2) cargo tendered at the CFS,
(3) cargo tendered at the dock,

provided, the *cargo* moved under the provisions of Rule No. 70B.

Cargo moving under the provisions of Rule No. 70B is specifically "cargo packed in containers by the shipper" and moving to certain destinations.

Thus when cargo was in shipper-packed containers, the tariff intended to impose the handling charge as of August 13, 1973, if the container was delivered to the CY or dock. No mention is made in Rule No. 70B(1)(a) of CFS cargo. Consequently, when shipper-packed containers delivered to the CY were deleted from Rule No. 70B(1)(a) as beneficiaries of the handling charge exemption, it was necessarily intended to remove the exemption for all shipper-packed containers received. (It must be remembered that no tariff rule authorized delivery of shipper-packed containers elsewhere than to the CY.)

When, however, only *cargo* delivered to the CY was deleted from Rule No. 19(c)(6), the intention was to make clear that cargo (as opposed to shipper-packed containers) would still receive the handling charge exemption when delivered anywhere except at the CY (the CY was solely for shipper-packed container deliveries—not for uncontainerized cargo).

When all the tariff rules are thus read as a unit, the alleged ambiguity disappears.

Also worth noting is Tariff Rule No. 70(5) which provides the tariff definition of "Place of Rest". It means "that location of the floor, *dock,*

platform or doorway *at CFS or carrier's dock at which cargo is first delivered* by shipper . . ."(Emphasis added). The term "dock" is clearly used in two different ways: first, in connection with cargo delivered to the CFS (non-containerized) and, second, in connection with the place where cargo not sent to the CFS is delivered. No mention is made of the CY. Add this to the fact that the longshore labor union will not permit truck delivery of cargo or shipper-packed containers to the "dock" at ship's side.[5] The only reasonable construction is that the term "dock" here and elsewhere, when used in connection with shipper-packed containers, refers to the CY. Thus when Rules Nos. 70B(1)(a) and 19(c)(6) were amended the intention and result was to remove shipper-packed containers delivered anywhere from the handling charge exemption.

I would deny reparations.

(S) JOSEPH C. POLKING,
Acting Secretary.

[5] Exhibit 1B, page 4.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–18

DOW CHEMICAL INTERNATIONAL, INC.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

ORDER

This proceeding having been initiated by the Federal Maritime Commission upon complaint, and the Commission having fully considered the matter, and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof:

IT IS ORDERED, That, pursuant to sections 18 and 22 of the Shipping Act, 1916, each of the following Respondents shall pay to Dow Chemical International, Inc. the sums identified immediately to the right of their names.

American President Lines, Ltd.	$9,841.79
Barber Lines, A/S	249.90
Pacific Far East Lines, Inc.	780.94
Sea-Land Service, Inc.	8,313.63
United States Lines, Inc.	71.40
Zim Israel Navigation Company, Ltd.	428.40
Kawasaki Kisen Kaisha, Ltd.	357.00
Showa Shipping Company, Ltd.	145.93
States Steamship Company	249.44

IT IS FURTHER ORDERED, That Respondents shall comply with the first ordering paragraph hereof on or before the 30th day after the date of this Order; and shall, within five days after compliance, notify the Secretary of the Commission of the date and manner of compliance.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

[46 CFR Chapter IV]
DOCKET NO. 73-5

SECTION 15 AGREEMENTS UNDER THE SHIPPING ACT, 1916

ORDER OF DISCONTINUANCE

February 24, 1977

This proceeding was instituted by notice of proposed rulemaking published February 23, 1973 (38 F.R. 4982). The proposed rules were designed to codify in one rule the various general provisions regarding section 15 agreements, and to set forth certain additional requirements including justification of agreements, time for filing of extensions of agreements, signatories of agreements and other provisions. Certain comments were received but upon request of interested persons the proceeding was postponed by the Commission to permit further consideration of the nature the proposed rules should take.

Since the postponement of this proceeding, time and events to a great extent have overtaken the original proposals. Recent Commission expressions and determinations regarding processing of section 15 agreements have negated the necessity or desirability of continuation of this proceeding in its present form. The more efficient procedure would be to fashion new proposed rules for further comment.

Accordingly, it is ordered that proceedings in this matter are hereby discontinued.

By the commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-51

PERRY'S CRANE SERVICE, INC.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

PARTIAL ADOPTION OF INITIAL DECISION

February 25, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)[1]

This proceeding was commenced with the filing of a complaint by Perry's Crane Service (Perry) against the Port of Houston Authority of Harris County, Texas (Houston) alleging that Houston has been engaging in certain practices in connection with the rental of heavy crane equipment which violate sections 16, 17, and 18 of the Shipping Act, 1916. (46 U.S.C. 815, 816, 817).[2]

The essence of the complaint is that certain tariff rules and related practices which give Houston's cranes first priority on jobs, even to the extent of displacing Perry's and other private crane owners equipment already working, are unduly and unreasonably preferential and unjust. Complainant is seeking a revision of tariff rules and related practices as well as reparation for the alleged violations.

In his Initial Decision, Administrative Law Judge Norman D. Kline concluded that:

(1) Houston's "first call" and "bumping" practices violate sections 16, First and 17 of the Shipping Act, 1916 (the Act) not only as applied against private crane operators such as Perry, but also with regard to stevedores hiring private cranes.

(2) Houston is entitled to a reasonable preference as to its own cranes and may retain "first call" privileges provided it can timely furnish a crane equally suited for the job. Houston may also retain its "bumping"

[1] Commissioner Bob Casey not participating.

[2] At the outset of the hearing, with the agreement of counsel, the Presiding Officer clarified the scope of the complaint to encompass only alleged violations of section 16, First and the second paragraph of section 17 of the Act.

privilege provided that it can furnish a more suitable crane for the job than that provided by the private crane owner.

(3) While "complainant has clearly suffered some financial injury because of respondent's practices," no reparation can be awarded on the record because of sketchy and confusing evidence as to the amount of reparation due Perry. The matter is remanded for further development.

Exceptions were filed by both Houston and Perry's Crane Service. Oral argument was requested by Houston but denied by the Commission.

Perry's only exception is to the conclusion of the Presiding Officer that Houston is entitled to a limited "first call" on crane work and a "bumping" privilege. It is contended by Complainant that all preferences accorded Respondent should be struck down as being in violation of sections 16 and 17 of the Shipping Act. 1916.

Houston, on the other hand, raises some thirty exceptions to the Initial Decision. For the most part, these exceptions constitute essentially rearguments of contentions already advanced before the Presiding Officer and rejected by him.

Upon review of the record, including arguments of counsel on brief and on exception, we find that the Initial Decision of the Presiding Officer is, except to the extent discussed below, well-founded and supported by the evidence. Accordingly, that decision is adopted except as modified herein.

Houston's exceptions go primarily to the emphasis placed on certain of the evidence by the Presiding Officer. Contrary to the findings made in the Initial Decision, Houston believes that the weight of the evidence favors it rather than Complainant. We disagree. Our review of the record supports the conclusions reached by the Presiding Officer. The testimony of Perry, other private crane owners, and stevedores who utilize crane equipment clearly establishes that Houston's practices result in a disruption to the proper handling of ships and an increase in expenses to stevedores as well as to private crane owners. The record indicates that Houston has unjustly preferred itself to private crane owners and subjected stevedores hiring private crane owners to "bumping" and other unreasonable practices while exempting stevedores who own their own cranes from such practices, all in violation of sections 16, First and 17 of the Act.

Houston argues that its practices have had little effect on Perry's operations and that Perry failed to show that the tariff provisions were the proximate cause of its injury. Houston attributes Perry's present financial plight to a lack of business acumen and a decline in total crane hours worked at Houston's facilities. While these factors may have had some bearing on Perry's declining revenues, the fact remains that Houston's restrictive practices did directly result in a loss of revenue in the fifteen documented instances where a Houston crane "bumped" a Perry crane. Thus, there is sufficient evience to show that Houston's practices were the proximate cause of Perry's injury.

We find little merit in Houston's challenge to the Presiding Officer's

"mini-monopoly" characterization of Houston's operations. As used in the Initial Decision, the term refers to the ability of Houston to exclude competition from *particular* jobs. The Presiding Officer found that the type of "restraint on competition here is not blatantly monopolistic or exclusive in terms of driving private crane owners out of the market," and that Houston, as a practical matter, "could not and does not wish to exclude all private competition from its facilities." However, as the Presiding Officer points out:

> . . . this limited mini-monopoly aspect of the first call, 'bumping' system should not be overlooked. It too runs counter to our national philosophy favoring free and open competition. Furthermore, even it if does not have to be justified with the same quantum of proof necessary in case involving completely exclusive and monopolistic privileges and practices, the lesser deree of an invasion of a national philosophy should nevertheless require justification albeit less stringent. (Cases omitted)

The Presiding Officer then goes on to describe how and why Houston's practices have made serious inroads upon the national philosophy favoring free and open competition. We agree with the findings of the Presiding Officer in this regard.

Houston is disturbed that the Presiding Officer allegedly did not confine himself to the facts in the complaint case but rather strayed into areas not relevant to the subject proceeding and "strains to bring within its ambit a class of persons neither parties hereto nor represented herein, as it if were a decision in an investigatory proceeding pursuant to Commission order." Houston argues that the Presiding Officer went beyond his authority in finding that Houston's practices are undue and unreasonable within the meaning of sections 16, First and 17 with regard to stevedores hiring private cranes. We fail to see the relevance or significance of this challenge to the Initial Decision. The evidence presented related directly to the operation of mobile cranes in and around Houston's facilities. While it is true that the complaint was brought by a private crane owner, the tariff provisions have a direct effect on stevedores utilizing these private cranes. It is the stevedore who goes out and hires the private crane and it is the stevedore who must notify the crane owner that he has been replaced by a Houston crane. The tariff provisions directly affect the stevedores' expenses in connection with the loading and unloading of vessels at the port and, to this extent, they have an impact on the ability of a stevedore who is subjected to these practices to compete with stevedores who are not so subject by virtue of the fact that they own their own cranes.

Finally, Houston takes issue with the Presiding Officer's remand of the proceeding to determine the amount of reparation due. Perry did attempt to offer evidence and proof of damage during the hearings. However, as the Presiding Officer found, such proof was "sketchy in general" and it was difficult to determine whether reparations were due in numerous "bumping" incidences. Further, certain of the claims for reparation are timed-barred by the two-year limitation of section 22 of the Act.

We agree with the Presiding Officer that Complainant is entitled to some degree of monetary restitution for losses occasioned by the unlawful practices of Houston. The extent of reparation cannot be determined on this record. A remand on that issue is accordingly in order. This procedure has been followed by the Commission in instances like the present when the record is full and complete on the issue of violation but is inadequate on the issue of damages. See *Pittston Stevedoring Corp. v. New Haven Terminal Inc.*, 13 F.M.C. 33, 34, 35 (1969); *Charles Salvesen and Company, Ltd. v. West Michigan Dock and Market Corporation,* 12 F.M.C. 135, 148 (1968). The parties should follow the procedures set forth in Commission Rule 15(b) which may avoid the necessity of further hearing.

The Presiding Officer found that Houston's current practices with respect to "first call" and "bumping" violated sections 16, First and 17 of the Act. Accordingly, he ordered Respondent to terminate these unreasonable practices and modify its activities to conform to the guidelines set forth by him in his Initial Decision. In this regard, he found that inasmuch as all preferences or advantages are not necessarily unlawful, and in consideration of Houston's peculiar situation, he would allow Houston some preference with respect to "first call" and "bumping" privileges.

We agree with the Presiding Officer that prior to the start of any job a stevedore should determine the availability of Houston's cranes and if there is one equally suitable for the job at hand then Houston should be given a preference as to furnishing a crane for that job.

Our basis for allowing a limited preference is similar to that advanced by the Presiding Officer; namely, Houston's heavy investment in cranes and extensive labor-related expenses and guarantees; declining share of available crane work; the flexibility of private cranes in moving from one location to another—an option not open to Houston; the fact that private crane owners are using facilities constructed and paid for by Houston to conduct their own private business; and the absence of any evidence that Houston is attempting to monopolize the crane rental business on its facilities.

The key determination to be made here is whether the granting of any "first call" privilege to Houston results in any *undue* or *unreasonable* preferential or prejudicial treatment. Houston's existing "first call" privilege is unlawful and the Presiding Officer correctly and properly so concluded. The Presiding Officer's modification of this privilege significantly limits Houston's preference and, in our opinion, results in a practice which, while still preferential, is no longer undue or unreasonable.[3] As we noted in *A. P. St. Philip, Inc. v. The Atlantic Land Improvement Company, et al.*, 13 F.M.C. 166 (1969), "Section 16 does

[3] In so finding, we specifically deny Complainant's motion of December 3, 1976 that, in the absence of replies to exceptions by Houston, Complainant's exceptions "should be in all things granted" and the Initial Decision expanded to eliminate all "first call" work privileges.

not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable." (p. 174)

There is no evidence that Houston is attempting to monopolize crane operations and give itself an exclusive right to rent cranes on its facilities. Indeed, the record indicates the contrary and those cases cited by Complainant dealing with *exclusive* rights are, for the most part, inapplicable to the facts in this proceeding.

The "first call" privilege, as modified, will require stevedores to select a Houston crane *only* if that crane is "suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane" (p. 23, Initial Decision). While there are other factors involved in selecting a crane, the stevedores emphasized that the size and expense of a particular crane were critical elements in its selection. In addition, a stevedore will be able to hire a private crane at the outset of a job if Houston cannot assure that a suitable crane will be available for the job. In view of the fact that Houston owns only 13 of the available 37 cranes used on Houston's facilities, the stevedores can be expected to utilize private cranes to a significant degree even with the limited "first call" preference we are allowing Houston.

However, assuming the unavailability of a Houston crane and the election by a stevedore to utilize a private crane for a particular job, that private crane operator should be permitted to perform the job to completion without "bumping" by a Houston crane, subject of course to the right of the stevedore to dismiss the private crane for failure to perform the job in a competent manner. Any continuation of "bumping" rights even as modified by the Presiding Officer would continue the practices found to be unlawful in this proceeding.

The record clearly shows that it is the "bumping" feature of Respondent's operations which generates the most concern among the private crane owners and stevedores. The practice of "bumping" which necessitates the removal of a crane already working results in the greatest disruption and expense to the stevedore and/or the private crane owner. While there is evidence in the record that total elimination of all priority rights for Houston might place Houston's crane business in a nonprofitable situation, elimination of "bumping," by itself, would have little effect on Houston's financial position. In addition, the Presiding Officer found that "bumping" results in discriminatory treatment between those stevedores owning their own cranes who are not subject to "bumping" and stevedores who must hire private cranes. Even as modified by the Presiding Officer, the "bumping" privilege would still result in disadvantage to stevedores who must hire cranes. Private crane renters would, of course necessarily continue to suffer as a result of the "bumping" practice.

Therefore, while there is support in the record for allowing a limited "first call" privilege to Houston, the practice of "bumping" cannot be justified even as modified by the Presiding Officer. In view of this, we are

vacating that portion of the Initial Decision which provides for the continuation of the "bumping" practice.

With the one exception discussed, we find that the Presiding Officer's findings and conclusions are proper and well-founded and we are accordingly adopting the Initial Decision as modified herein. The proceeding is remanded to determine the amount of reparations due Complainant.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted in its entirety except that portion of the Initial Decision which allows for the continuation of "bumping".

IT IS FURTHER ORDERED, That Houston shall immediately cease and desist from those practices found unlawful in this proceeding and shall, within 30 days of the date of this Adoption, file appropriate tariff amendments.

FINALLY, IT IS ORDERED, That this proceeding be remanded to determine the amount of reparations due Complainant.

Vice Chairman Clarence Morse, concurring and dissenting.

I concur in the majority report insofar as it finds "bumping" is an unlawful practice and remands the issue of reparations.[4] I dissent from the finding that the preference for Respondent's cranes is permissible or lawful for Respondent when holding its terminal facilities out to be public and open.[5]

The Administrative Law Judge made a thorough and well reasoned analysis of the preference issue. Nevertheless, he and the majority conclude that despite existing law, the preference here allowed Respondent is lawful. I disagree.

The Administrative Law Judge set forth the role of the stevedore in

[4] Such remand is consistent with 46 C.F.R. 502.251 and .252.

[5] A brief discussion indicating the basic methods and arrangements for owning, leasing, and operating terminals may be helpful.

Terminals are owned either privately (i.e., by individuals or by corporations, and irrespective of whether stock ownership in the corporation is closely held or widely held) or municipally (i.e., by state or local government authority or subdivision thereof). In the instant case the ownership of the terminal is municipal—the Port of Houston Authority.

Terminals hold themselves out as proprietary terminals (serving mainly tramp ships and the needs of the terminal operator and not open to use by common carriers or by the public) or as public terminals which service common carriers by water. In this sense the terminal under consideration is public.

In turn, a terminal serving common carriers by water may be open (in that the operator holds itself out to serve any and all common carriers who, in turn, may employ any stevedoring company of its choice to service its vessel) or it may be closed (a terminal which is owned by or leased or preferentially assigned to a terminal operating company which frequently has its own stevedoring operation and holds itself out to provide full terminal and stevedoring services and facilities to its common carrier customers, often on an agreed contract basis). In this sense the terminal under consideration is open.

In those instances where a closed terminal, as here defined, is lawful, the operator is frequently a cargo liner/common carrier company which has sufficient frequency of vessel calls and volume of cargo to be carried as to require full utilization of the terminal to meet its own requirements. The other type of closed terminal exists where a terminal operating company leases the terminal for the purpose of holding itself out to provide, usually, both terminal and stevedoring services to common carriers either on a contract basis or on a tariff basis. In either of these two instances just mentioned there would be other terminal facilities within the port where terminal operators hold themselves out to provide terminal services on an open basis to any and all common carriers by water to the end that common carriers have a full choice as between closed terminals and open terminals and a monopoly of terminal facilities does not exist.

A terminal may be operated by or for the owner, or it may be operated by a terminal operating company for its, the operating company's, own account. Here, the Port of Houston Authority operates the terminal for its own account.

ocean commerce, the need for the vessel operator to have freedom in stevedore selection, and the necessity for open competition in stevedoring. In connection with each of these aspects of the preference issue, the Administrative Law Judge analyzed and applied Commission and judicial precedent, notably *Greater Baton Rouge Port Commission* v. *United States*, 287 F. 2d 86 (5th Cir. 1961); *A. P. St. Philip, Inc.* v. *The Atlantic Land & Improvement Company, et al.*, 13 F.M.C. 166 (1969); and *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75 (1962). It is then concluded, and I agree, that artificial restraints on terminal-related and stevedoring activities are fundamentally and inherently improper either in the vessel's free right of selection of a stevedore or in the stevedore's free right of selection or proper equipment.

Then, however, the Administrative Law Judge and the majority find that in this case precedent need not be followed.[6] Yet nowhere do they find facts in this case or cite legal authority which warrants the setting aside of established principles of prior cases.

Heretofore this Commission has held various exclusive or preferential or unfair arrangements of public terminals to be unlawful under section 16 First and/or section 17, Shipping Act, 1916:

A. P. St. Philip, Inc. v. *The Atlantic Land & Improvement Co., supra,* access of vessel to the terminal conditioned on utilization by vessel of a tug operator favored by the public (non-proprietary) terminal operator.

California Stevedore & Ballast Co. v. *Stockton Port District, supra,* exclusive right in favored stevedoring company to provide all stevedoring services at the public (non-proprietary) terminal.

Greater Baton Rouge Port Commission v. *United States, supra,* stevedoring provided exclusively by operator of public (non-proprietary) terminal to the total exclusion of competing stevedores.

California Stevedore & Ballast Co. et al. v. *Stockton Elevators, Inc.;* 8 F.M.C. 97 (1964), a public terminal (non-proprietary) may not assess one stevedore a charge for rental of terminal-provided equipment and not assess a like charge against a favored stvedore.

Respondent's right of first refusal on crane rentals is clearly a monopolistic practice. Respondent's self-preference is either lawful or not. It is not legitimatized by the fact that Respondent is a public body. The Administrative Law Judge correctly disposed of that issue, citing *United States* v. *California*, 297 U.S. 175 (1936). The self-preference granted here is also not rendered proper by making it a somewhat narrower preference than that now stated in Respondent's tariff. That Respondent has a large investment in cranes is not controlling, and yet that is a basic justification offered. The Commission's mandate is not to guarantee that every capital investment will be recouped. Rather the Commission should ensure only that terminals subject to its jurisdiction

[6] *AT&SF R Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) recognizes the Commission's power to change policy, but nevertheless mandates that it is "the agency's duty to explain its departure from prior norms".

neither unduly or unreasonably prefer themselves nor adopt unjust or unreasonable regulations or practices.

The arrangement here—free right of access by all stevedores to the open terminal, coupled with Respondent terminal's right of first refusal in the renting of cranes when their rental is required by the stevedore—is analogous to tying arrangements under antitrust laws. Tying arrangements are frequently treated as per se violations of section 1 of the Sherman Act on reasoning similar to that used in price-fixing cases. In all events, "Tying arrangements serve hardly any purpose beyond the suppression of competition", *Standard Oil Co. of California* v. *U.S.*, 337 U.S. 293, 305–506 (1949). As stated by the Court in *U.S.* v. *Loews Inc.*, 371 U.S. 38, 44–45 (1962), "[Tying arrangements] are a concern for two reasons—they may force buyers into giving up the purchase of substitutes for the tied product (citations) and they may destroy the free access of competing suppliers of the tied product to the consuming market."

The tying arrangement involved here—the Port of Houston Authority's right of first refusal when a stevedore needs to rent a crane—suppresses competition by Complainant, denies Complainant access to the market for crane rental, denies to the stevedore access to rental cranes from persons other than Respondent, and discriminates as between stevedores who own their own cranes and stevedores who do not in that stevedore/owners can select and use their own cranes whereas stevedore/nonowners are compelled to select and use Respondent's cranes. By analogy, if a tying device is unlawful under the Sherman Act the similar self-preferring device used here is prima facie unreasonable and unlawful.

It is to be noted, of course, that the self-preference provision compels the stevedore to rent Respondent's crane, whereas the stevedore may prefer Complainant's crane because the latter, even assuming the same lift capacity, may be easier to operate, may have a greater operating radius, may be newer, may be better maintained, may function more rapidly, may be safer in use, may have more favorable payment (credit) arrangements, etc., etc., etc. But whether Complainant's crane is or is not superior is not the basic issue. The basic issue here is whether Respondent can lawfully claim self-preference—the right of first refusal on crane rentals.

A terminal operator which provides cranes for rental must adopt just and reasonable rules governing their rental and utilization. *California Stevedore & Ballast Co. et al.* v. *Stockton Elevators, Inc., supra,* 8 F.M.C. at 103. Granting itself self-preference (or the right of first refusal) ro provide rental cranes is prima facie unjust and unreasonable, and the burden of sustaining such practices as being just and reasonable is a heavy one. Respondent has totally failed to sustain this burden.

To justify approving the right of first refusal (the self-preference provision) Respondent relies upon the fact that the Respondent (1) is a state agency and therefore is not governed by the Shipping Act, 1916, (2) has a big investment in these rental cranes and requires self-preference in

order to amortize the cost of the cranes, (3) is a terminal whose cranes may be used only upon its own premises, (4) has less than its fair share of the crane rental market, and (5) employs 16 crane operators who are guaranteed 60 hours straight-time pay per two-week pay period and also employs 16 mechanics and maintenance men.

Point (1)—the state agency exemption—has been demolished. *United States* v. *California, supra.* Point (2) is applicable to every commercial enterprise. If Respondent's commercial needs are the test then every self-preferential, unduly restrictive, or monopolistic tariff rule must nevertheless be found to be lawful on a simple showing that the terminal requires the self-preferences to enable it to pay its debts. Respondent was not compelled to buy cranes. There is no evidence that the vacuum—absence of cranes—would not have been filled by equipment rental firms. Respondent took an ordinary and calculated business risk in acquiring cranes, and we should not "pull its chestnuts from the fire" at the expense of Complainant or the public. Complainant itself has an investment in cranes (perhaps as to Complainant relatively greater than Respondent's investment in cranes is to Respondent) which is not "protected" by any self-preference provision such as that being asserted by Respondent, and yet both—Complainant and Respondent—voluntarily entered the crane rental business expecting to do business on a fair and equal competitive footing. Point (3) lends no support to Respondent, for it must have known before it bought its cranes that they could not be rented for use off-terminal (if, in fact, that prohibition exists at all). As to Point (4), the fact it has but 23% of crane rental business in 1976 establishes nothing. The Administrative Law Judge found that Respondent's crane usage (rental) dropped from 60% of total crane usage on Respondent's facility in 1971 to 26% in 1975 and to about 23% in the first quarter of 1976. Further, the total crane hours worked on the facilities in 1975 was 82% of the hours worked in 1974. This indicates to me that 1974 was, relatively, a boom year for the terminal as it was for world-wide trade. The Administrative Law Judge also found that in 1975 Respondent's cranes worked only 75% of the hours they had worked in 1974, whereas privately-owned cranes in 1975 worked 85% of the hours they had worked in 1974. The obvious explanation for the fall-off in usage of Respondent's cranes, comparing 1975 with 1974, is twofold; one, a decline in aggregate cargo movement in 1975 as compared to 1974, and second, and most revealing, is the Administrative Law Judge's finding Number 28 that:

> 28. There has been an increase in the number of stevedoring concerns purchasing cranes for use on vessels. This has had an appreciable effect on Respondent's crane rental operations in terms of revenues and has also cut into the crane work available for privately owned cranes.

Thus, stevedore-owned cranes are doing a progressively increasing percentage of the crane work at the terminals since Respondent, in 1973, amended its tariff to permit stevedore-owned cranes to have first call for

work on their own vessels and freight-handling activity, and thereby obviously having an adverse effect on the crane rental opportunities of both Complainant and Respondent. In 1962 there were 2 privately-owned cranes, and in 1976, 37 privately-owned cranes in use at the facilities. Respondent's 13 cranes constitute 26% of the total cranes being employed on Respondent's property. As to Point (5)—the fact that Respondent guarantees 60 hours straight-time pay per two-week work period to its 16 crane operators—may be, as to Respondent, an improvident undertaking. But, if so, that is no reason for permitting tariff rules which unfairly prejudice Complainant.

What then are the alleged "justifications" for approving this tariff rule? In the ultimate test it is "MONEY"—not transportation need, not public benefit, not service requirement, no efficiency, not availability, not superiority of equipment. If the need for money is the test, then we are in trouble, for the need for money is pervasive in most business enterprises, and therefore all self-preferences would be lawful.

I am not suggesting that Respondent might not, in proper factual circumstances, hold itself out to operate its terminals, itself, as "closed terminals", doing all the stevedoring on the terminals and itself providing all the required crane services. But it did not attempt to do so. Furthermore, for such conduct to be lawful, there must be other terminal facilities in the port which are open terminals to the end that Respondent would not be maintaining a monopoly on terminal facilities. Thus, in *Agreements Nos. T-2455/T-2553,* 14 SRR 1317 (1974), we held the agreements to be monopolistic and unlawful under sections 15 and 17 of the Shipping Act, 1916, which had the effect of granting Lavino Shipping Co. a monopoly on all modern container terminal facilities in the Port of Philadelphia. Compare *Agreement—Port Canaveral and Luckenbach S.S.,* 17 F.M.C. 286 (1974). In any event, Respondent elected to operate its terminals as "open" terminals, not as "closed" terminals. Having made that election, then stevedores which service the terminals may not be denied the right to utilize any crane facilities of their choosing absent a strong showing by Respondent that its monopolistic tariff rules are just and reasonable. *Calif. S. & B. Co., et al.* v. *Stockton Port District, et al., supra,* 7 F.M.C. at 84; *Pittston Stevedoring Corp.* v. *New Haven Terminal, Inc.,* 13 F.M.C. 33 at 44; *A. P. St. Philip, Inc.* v. *Atlantic Land & Improvement Co. etc., supra,* 13 F.M.C. at 173. Such strong showing was not made herein.

The majority disallows, and properly so, Respondent's "bumping" practice. Such disallowance is, however, inconsistent with approving self-preference to Respondent. If "bumping" is incompatible with the stevedore's right to continue utilizing its chosen equipment, for like reasons the first-call self-preference is incompatible with a stevedore's

right to select at the outset the equipment it thinks best suited to its needs. The two situations are indistinguishable.

(S) JOSEPH C. POLKING,
Acting Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDER 22; DOCKET NO. 76-65]

Part 503—Public Information

February 25, 1977

Pursuant to provisions of the "Government in the Sunshine Act" (P.L. 94-409; 5 U.S.C. §552b, September 13, 1976) the Commission published in the *Federal Register* (41 F.R. 55207, December 16, 1976) its proposed regulations implementing that Act. Interested parties were encouraged to submit comments on these proposed regulations. Four such comments were received.*

Of the four parties submitting comments, two objected to the failure of the Act and of the proposed regulations to provide as one ground upon which an interested person may seek closure of a meeting, the likelihood that the meeting will disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential. This Commission can readily understand this objection but is powerless to provide by regulation a procedure not authorized by the statute. The Commission, therefore, is compelled to disregard this objection.

Additionally, one party objected that the proposed regulations provide no opportunity for an interested party to request the Commission to withhold information from public disclosure while the Commission itself may do so. Again, we are powerless to extend the authority of the Act. The Act does not provide for the action of an interested party, as sought by the commenting party. Therefore, we may not so provide by regulation.

The third commenting party addressed our proposed regulations in more detail. This party objected to our description in our statement of policy (§503.70) of these regulations as setting forth "procedural requirements" designed to provide the public with information while maintaining "capabilities" of the Commission in carrying out its responsibilities. The party recommends deletion of the term "procedural." We think such a

*The parties filing comments were: (1) the law firm of Graham and James; (2) Outboard Marine Corporation; (3) law firm of Casey, Lane & Mittendorff; and (4) the Honorable Jack Brooks, M.C., Chairman, House Committee on Government Operations.

change to be unnecessary. We therefore, have not adopted this proposal. This party also urges that "capabilities" is not synonymous with the term "ability" as used in the Declaration of Policy of the Act. We can see no substantive difference between the two words in a statement of policy which would merit modification.

This party recommends changing the definition of "agency" from "Federal Maritime Commission" (§503.71) to "Federal Maritime Commission or a quorum thereof or any subdivision thereof authorized to act on behalf of said Commission." This change it is urged would make the definition consistent with §522b(a)(1) of the Act. We disagree. A quorum of the FMC is not the same as the FMC nor is a quorum of the FMC an "agency . . . headed by a collegial body, . . ." as defined in §522b(a)(1) of the Act. Additionally, we specifically omitted reference to a subdivision of the Commission authorized to act on behalf of the Commission because there is no such entity. Reference to a non-existent entity, we feel, would be confusing and, therefore, unwise.

This party also seeks to have the definition of "information pertaining to a meeting" expanded to include meeting minutes and other information referred to in 5 U.S.C. 552b(f)(1)–(2). We think this evidences a misunderstanding of "information pertaining to a meeting" as used in the Act. The Act describes such information as being capable of exemption from the requirements of subsections (d) and (e) of the Act. Those subsections simply do not apply to the information referred to in 552b(f)(1)–(2).Therefore, in our opinion, "information pertaining to a meeting" refers to that amenable to the provisions of subsections (d) and (e) only.

Additionally the party finds fault in our use in the definition of "meeting" of the words "the deliberations of at least three of the members . . .". This party urges us to adopt the word "majority" instead. This we may not do. The Reorganization Plan 7 of 1961 (75 Stat. 840, April 12, 1961) requires in *all* cases to affirmative vote of not less than three members of the Commission to conduct its business irrespective of the number actually in office. Hence, our use of the word "three" rather than a "majority."

This party also objects to our specific removal in the regulations from the definition of meeting of those items of business determined *seriatim* by members on notation. This is explicitly permitted as discussed in the legislative history of the Act (see Conference Report to accompany S. 5 at p. 11).

This party then suggests two further non-substantive word changes which are of no merit. However, the party does note an omission in our proposed regulations which clearly merits remedy. Section 503.77 of the proposed regulations was meant to provide in the second sentence of paragraph (a) that if, in the opinion of the General Counsel, a meeting or a portion thereof could properly be closed under the Act his certification of such opinion must contain certain information. Unfortunately, as

proposed, the regulation provided: "If, in the opinion of the General Counsel, a portion or portions of a meeting . . . is proper. . . ." As can be seen, we omitted the phrase "the closing of." Therefore, we amend this provision to read: "If, in the opinion of the General Counsel the closing of a portion . . ." etc.

The fourth interested party filing comments was the Honorable Jack Brooks, M.C. in his capacity as chairman of the House Committee on Government Operations on behalf of that Committee. Mr. Brooks had three suggestions to offer.

Mr. Brooks first suggests that sections 503.73 and 503.74 be amended to make clear that there are two separate steps in any determination to close a meeting to public observation. It is noted that the Commission must decide: first, whether or not the meeting fits within one of the exemptions of the Act so as to permit the meeting to be closed; and second, notwithstanding the applicability of an exemption, whether or not the public interest requires that the meeting remain open. It is suggested by Mr. Brooks that the proposed regulations:

> . . . seem to suggest that the Commission need consider the public interest only if it chooses to, whereas the Act contemplates that the public interest issue will be considered in each instance where the Commission determines that a discussion comes within a specific exemption.

We agree with Mr. Brooks' view of the requirements of the Act.

Therefore, we have adopted appropriate modifications to our proposed regulations. We have amended section 503.74 by: (1) adding the following language at the end of paragraph (d) of that section:

> That vote shall determine whether or not any portion or portions of a meeting or portion or portions of a series of meetings may be closed to public observation for any of the reasons provided in section 503.73 of this Subpart, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in section 503.73 permitting the closing of any portion of any meeting to public observation.

(2) by amending paragraph (e) to read:

> (e) In the case of a vote on a request under this section to close to public observation a portion or portions of a meeting, no such portion or portions of any meeting may be closed unless, *by a vote on the issues described in paragraph (d) of this section,* a majority of the entire membership of the agency shall vote to close such portion or portions of a meeting by recorded vote. [new material italicized]

(3) by amending paragraph (f) to read:

> (f) In the case of a vote on a request under this section to close to public observation a portion or portions of a series of meetings as defined in section 503.71 of this Subpart, no such portion or portions of a series of meetings may be closed unless, *by a vote on the issues described in paragraph (d) of this section,* a majority of the entire membership of the agency shall vote to close such portion or portions of a series of meetings. A determination to close to public observation a portion or portions of a series of meetings may be accomplished by a single vote *on each of the issues described in paragraph (d) of this section,* provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote. [new material italicized]

Further, we have amended section 503.75 by:

(1) amending paragraph (g) thereof by adding the following language at the end thereof:

That vote shall determine whether or not any portion or portions of a meeting or portion or portions of a series of meetings may be closed to public observation for any of the reasons provided in paragraph (a) of this section, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in paragraph (a) of this section permitting the closing of any portion of any meeting to public observation.

(2) amending paragraph (h) to read as follows:

(h) In the case of a vote on a request under this section to close to public observation a portion of a meeting, no such portion of a meeting may be closed under, *by a vote on the issues described in paragraph (g) of this section,* a majority of the entire membership of the agency shall vote to close such portion of a meeting by a recorded vote. [new material italicized]

Mr. Brooks' second suggestion regards alleged inadequacy of our proposed procedures for accomplishing public announcement of forthcoming FMC meetings. Mr. Brooks notes that our proposed regulations (§§503.82 and 503.83) make provision only for public notice, generally, followed by publication in the *Federal Register*. These provisions are alleged to "fall considerably short of the notice envisaged under the Act, which should include publication in publications whose readers may have an interest in the Commission's operations . . ." and the use of mailing lists. We understand the motivation of the Act and the necessity for the widest practicable notification of Commission meetings. Therefore, our regulations were framed in general terms to permit this agency the widest possible latitude to inform the public of its meetings by the most effective means. The Commission fully intends to publish the announcement of forthcoming meetings by appropriate methods in addition to publication in the *Federal Register*. For example, among other possible means of dissemination, notices of pending meetings will be provided in the Commission's public reference room. It has been our experience that trade publications do promptly publish all the information made available by this Commission which is of general interest to their subscribers.

We have not further specified means of dissemination of information because we are of the opinion that the notification policy of the Act will be served more effectively by allowing us flexibility in this area. We wish to stress that we have every intent to fully implement the Act's notification policy by dissemination to the widest possible audience.

Finally, Mr. Brooks objects to the provisions of the proposed regulations regarding certification by the agency's General Counsel as not explicitly providing that such certification will precede the vote of whether or not to close a meeting. Sections 503.74(d) and 503.75(g) implicitly provided for this by stating that the vote of the agency to close a meeting may be taken only "upon consideration of the certified opinion of the General Counsel of the agency provided the members under section

503.77 of the Subpart. . . ." Nonetheless, in the interest of absolute clarity we have amended the first sentence of paragraph (a) of section 503.77 to read:

(a) Upon any request that the agency close a portion or portions of any meeting or any portion or portions of any series of meetings under the provisions of sections 503.74 and 503.75 of this Subpart, the General Counsel of the agency shall certify in writing to the agency, *prior to an agency vote on that request,* whether or not in his or her opinion the closing of any such portion or portions of a meeting or portion or portions of a series of meetings is proper under the provisions of this Subpart and the terms of the Government in the Sunshine Act (5 U.S.C. §552b). [new material italicized]

In addition to the comments of the four interested parties, the Commission has reviewed these proposed regulations *sua sponte*. Our review has unveiled three difficulties which we now take the opportunity to remedy. Mr. Brooks' suggestion regarding the public interest issue in any determination to close a meeting caused us to review our provisions regarding withholding from public disclosure information pertaining to a meeting. In our opinion, the introductory language of the Act providing "Except in a case where the agency finds that the public interest requires otherwise . . ." applies to determinations of whether or not to withhold from public disclosure information pertaining to a meeting as well as to determinations to close a meeting.

We have, therefore, amended section 503.80 to conform to that view. As amended, section 503.80 now requires that the Commission base any determination to withhold information from disclosure on resolution of both whether or not an exception is applicable *and* whether or not, notwithstanding the applicability of an exception, the public interest requires disclosure. In our opinion, this amendment conforms more precisely to the statutory scheme.

Therefore, we have amended section 503.80 by: (1) adding a sentence at the end of paragraph (c) reading as follows:

That vote shall determine whether or not information pertaining to a meeting may be withheld from public disclosure for any of the reasons provided in section 503.79 of this Subpart, and whether or not the public interest requires that the information be disclosed notwithstanding the applicability of any of the reasons provided in section 503.79 of this Subpart permitting the withholding from public disclosure of the information pertaining to a meeting.

(2) amending paragraph (d) to read:

In the case of a vote on a request under this section to withhold from public disclosure information pertaining to a portion or portions of a meeting, no such information shall be withheld from public disclosure unless, *by a vote on the issues described in paragraph (c) of this section,* a majority of the entire membership of the agency shall vote to withhold such information by a recorded vote. [new material italicized]; and

(3) amending paragraph (e) to read:

In the case of a vote on a request under this section to withhold information pertaining to a portion or portions of a series of meetings, no such information shall be withheld unless, *by a vote on the issues described in paragraph (c) of this section,* a majority of the entire membership of the agency shall vote to withhold such information. A determination to withhold information pertaining to a portion or portions of a series of meetings from public disclosure may be accomplished by a single vote *on the issues described in paragraph (c) of this section,* provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote. [new material italicized].

Under the provisions of §503.75 as proposed, at the request of an interested party that a meeting or portion be closed, any agency member, the Managing Director or the General Counsel would request agency action on that proposal. (§503.75(d)). Upon review of the provisions of the Act, we conclude that in such circumstances, only a member of the agency may seek agency action on such a request. Therefore, we have deleted from section 503.75(d) the language: ". . . the Managing Director, or the General Counsel of the agency. . . ."

Additionally, our review of proposed sections 503.86 and 503.87 has revealed wording which might have been confusing if not clarified. Section 503.86(a) originally referred to ". . . all records required to be maintained by the agency under the provisions of section 503.85 of the subpart. . . ." That reference was overbroad. It would have included items to which public access was not contemplated under the Act. To remedy this overbreadth we have amended that sentence to read: "All transcripts, electronic recordings or minutes required to be maintained by the agency under the provisions of section 503.85(a)(3) and (b) of this Subpart. . . ." Hence, for internal consistency we necessarily amended section 503.87(a) to conform to the language of section 503.86 regarding "transcripts, electronic recordings" and "minutes" rather than "records" generally. This revision comports with the wording of the Act which refers only to these specific items. (5 U.S.C. 552b(f)(2)).

All amendments made herein have made these regulations conform precisely to the Government in the Sunshine Act with respect to the activities of the Federal Maritime Commission.

THEREFORE, IT IS ORDERED, That pursuant to the Government in the Sunshine Act (P.L. 94–409; 5 U.S.C. §552b, September 13, 1976), Part 503 of Title 46 C.F.R., is hereby amended by adding a new Subpart H.*

Effective date. These regulations shall be effective as of March 12, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 503(H).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 502

KOHLER INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

February 22, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 22, 1977.

It is Ordered, That applicant is authorized to refund $453.20 of the charges previously assessed Kohler International, Ltd.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 502 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976 through August 25, 1976, the rate to Group 1 Ports on various articles of plumbing fixtures embodied in Items 812 2010 00, 812 2010 20, 812 2020 00, 812 2020 20, 812 3010 00, 812 3010 20, 812 3020 00, 812 3020 20, 812 3030 00 and 812 3030 20 is $47 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 502

KOHLER INTERNATIONAL, LTD.

v.

SEA-LAND SERVICE, INC.

Adopted February 22, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of plumbing fixtures and parts that moved from New York to Tokyo, Japan, under a Sea-Land bill of lading dated June 30, 1976. The application was filed December 17, 1976.

The subject shipment moved via mini-bridge service under a through rail-water rate published in Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92. The shipment moved via rail to Oakland, then via Sea-Land from Oakland to Tokyo. Refund of the charges involved here would affect only the ocean carrier's portion. The shipment weighed 27,832 pounds and measured 2,266 cubic feet. The rate applicable at time of shipment was $55 per ton of 40 cubic feet or 2,000 pounds (Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 812 3020 00, to Group 1 Ports, 2d revised, p. 550–A). The rate sought to be applied is $47 per ton of 40 cubic feet or 2,000 pounds (Sea-Land Freight Tariff No. 234, FMC No. 106, ICC No. 92, Item 812 3020 00, to Group 1 Ports, 3rd revised, p. 550–A).

Aggregate freight charges collected, pursuant to the rate applicable at time of shipment, amounted to $3,115.75. Aggregate freight charges at the rate sought to be applied amount to $2,662.55. The difference sought to

[1] This decision became the decision of the Commission February 22, 1977.
[2] 46 U.S.C. 817, as amended.

be refunded is $453.20. The Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same period of time at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4) A special rate of $47.00W/M had been established in Tariff No. 234, FMC No. 106, on various articles of plumbing fixtures that are shipped by the complainant including, among others the following tariff item numbers:

1st Revised Page 550	Items	812 2010 00
		812 2010 20
		812 2020 00
		812 2020 20
1st Revised Page 550–A	Items	812 3010 00
		812 3010 20
		812 3020 00
		812 3020 20
		812 3030 00
		812 3030 20

The special rates in the above items were established effective September 22, 1975 (Attachment No. 1) to meet all water competition, with an expiration date that was extended to October 31, 1976.

Effective May 1, 1976 a general rate increase was published in Tariff No. 234, following a comparable general increase published in the all-water rates by the Far East Conference. In preparation for it, Sea-Land's trans-Pacific pricing department in Oakland office had decided that the increase would not be applied to any special rates established independently to meet other competitive carriers' rates. Instructions to follow this plan were given to all concerned in teletype message dated January 23 (Attachment No. 2).

Unfortunately, in reissue of the tariff pages to roll in the increase effective May 1, 1976, the above two pages, containing 5 of the separate commodity items of plumbing fixtures, were overlooked in the clerical process. This clerical and administrative error resulted in these items being erroreously increased to $55.00W/M (Attachment No. 3). The complainant had been informed by Sea-Land that the increase would not be applied to any of these special rates.

Complainant made the shipment involved herein on June 30, covered by B/L—F/B 901–817477 (Attachment No. 4). It consisted of articles for which the then applicable rate, erroneously increased, was $55.00 in Item 812 3020. Charges of $3,115.75 were assessed on this rate and paid to Sea-Land by the complainant's freight forwarder. The error in increasing the rate was then discovered and request to correct it made by our Chicago sales personnel in teletype of July 23 to all concerned (Attachment No. 5). The increase in the affected items was removed and the rate to Group 1 Ports restored to $47.00W/M on 4th revised page 550 and 3rd revised page 550–A effective August 25, 1976 (Attachment No. 6).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by

Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the failure to withhold the general rate increase from the special rates, as had been promised to the shipper.

2.Such refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such refund would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to refund a portion of the freight charges, specifically the amount of $453.20. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 26, 1977.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(F)

THEFEDERAL MINISTER OF DEFENSE
FEDERALREPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY AND REPUBLICVAN AND STORAGE OF LOS ANGELES, INC.

ORDER

March 1, 1977

This proceeding involves a claim for reparation on an alleged overcharge of ocean freight for a shipment of an automobile from California to Germany. The matter was considered by a Settlement Officer who dismissed the complaint. On review, the Commission decided that a proper determination of the matter required evidentiary proceedings. The matter was remanded and referred to an Administrative Law Judge for such proceedings and decision.

Subsequently the parties by joint motion advised that they had resolved their differences and that a settlement was reached whereby Respondent would pay the full amount claimed, subject to receipt of guarantees from the Commission that no civil penalties would be recovered arising from the acts set forth in the complaint.

Administrative Law Judge Thomas W. Reilly, citing case law to the effect that settlements are to be favored, indicated that he would approve the settlement but further indicated that he was not empowered to act on or to bind the Commission on the question of civil penalties. The Presiding Officer therefore granted the motion to dismiss while referring to the Commission the matter of civil penalties.*

In their motion Respondents have asserted that the agreement to make full settlement should not be construed as an admission of any violation of any of the shipping acts. The Presiding Officer, in approving the

*Counsel for Respondents thereupon advised that they would defer implementation of the settlement pending issuance of an order by the Commission approving the settlement embodying all terms thereof including the matter of civil penalties.

settlement, made no specific finding regarding a violation, but advised that:

> . . . repayment of the full amount claimed would restore the total amount paid to that quoted in the original estimate, and that the original estimate was, in all probability, the only amount justified by filed tariffs.

The Presiding Officer conceded, however, that this assumption cannot be conclusively established because of the lack of documentation a diligent search failed to produce.

Nothing has been added to the record since the remand which would shed some light on the transaction, so that even the threshold question of whether we have jurisdiction over the matter cannot be answered with any degree of certainty. Moreover, even assuming jurisdiction, the Commission cannot ratify the Presiding Officer's approval of the settlement in the absence of a specific finding of violation of section 18(b)(3). An agreement to settle a claim for reparation based on an allegation of a violation of section 18(b)(3), can be approved only on an affirmative finding that such violation occurred. See the cases cited in the Presiding Officer's Order of Dismissal, *i.e., Consolidated International Corp. v. Concordia Line,* 14 SRR 1259 (1975) and *Merck, Sharp & Dohme v. Atlantic Lines,* 14 SRR 232 (1974). Here, not only has a violation of section 18(b)(3) not been established by the Presiding Officer but Respondents have specifically advised that the settlement is not to be construed as an admission of any violation on their part.

While the Commission cannot formally approve the stipulation agreement between the parties here, in the absence of a violation of the Shipping Act, 1916, it also finds, for the same reason, no basis to impose any civil penalties. Accordingly, because the parties have apparently resolved their differences to their mutual satisfaction, we see no purpose to be served by their litigating the matters put at issue by the complaint. Under the circumstances, the parties are free to take whatever action they deem necessary to terminate this proceeding.

However, because the Presiding Officer's dismissal of the proceeding is premised on the Commission's approval of a settlement agreement which, under the circumstances, the Commission cannot approve, and because the parties based their request for dismissal upon such approval, the Presiding Officer's ruling dismissing the proceeding must be vacated and the proceeding remanded for whatever action he and the parties deem proper and warranted.

THEREFORE, IT IS ORDERED, That the Presiding Officer's ruling approving the settlement and dismissing the complaint be, and is hereby, vacated;

IT IS FURTHER ORDERED, That the proceeding be remanded to the Administrative Law Judge.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 356(I)

HOBELMANN INTERNATIONAL, INC. FMC 850–R
AGENTS FOR AND ON BEHALF
OF
THE RANSOM & RANDOLPH COMPANY
A DIVISION OF
DENTSPLY INTERNATIONAL, INC.

v.

MOORE-MCCORMACK LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

March 2, 1977

Notice is hereby given that the Commission on March 2, 1977, determined not to review the decision of the settlement officer in this proceeding served February 18, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 356(I)

HOBELMANN INTERNATIONAL, INC. FMC 850–R
AGENTS FOR AND ON BEHALF
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A DIVISION OF
DENTSPLY INTERNATIONAL, INC.

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Reparation awarded.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

By complaint filed June 30, 1976, Hobelmann International, Inc., a licensed ocean foreign freight forwarder, as agent for Ransom & Randolph Company, a division of Dentsply International, Inc., alleges that charges in excess of those lawfully applicable for transportation in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817, were assessed by respondent Moore-McCormack Lines, Incorporated, a common carrier by water in the foreign commerce of the United States, on a shipment of dental investment on July 3, 1974, from Baltimore to Buenos Aires, Argentina. One thousand, three hundred and fifteen dollars and thirtyfive cents, the amount of the alleged overcharge, is sought as reparation.

The complainant described the shipment on the bill of lading by "the broad commercial description" Dental Investment Multi-Vest, consisting of 231 drums weighing 25,410 pounds or 11,526 kilograms and measuring 632 cubic feet. The shipment was rated on the basis of a Cargo, N.O.S., $125.00 W/M rate[2]. The freight was $2,133.00. The shipment, it is alleged, should have been rated on the basis of a fire ground clay rate at $41.75 W/M[3]. The freight would then have been $817.65.

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review March 2, 1977.)

[2] Rate Item I, Clay, N.O.S. W/M $125.00, Inter-American Freight Conference—Section A Tariff No. 3 (F.M.C. No. 7), From: United States Atlantic And Gulf Ports To: Ports Of Brazil—Uruguay Argentina—Paraguay. 8th. Revised Page 93, Effective date May 10, 1974.

[3] See footnote 13.

The complainant contends that dental investment or Ultra-Vest Jewelry Investment or Ultra-Vest Investment is a powder used to form molds in the investment casting of jewelry or, in the present situation, used in investment casting of dental prosthetic devices. Therefore, complainant argues, it should have been classified as a fire ground clay. The complainant also quotes the statement of Dentsply International, speaking for the Ransom & Randolph Company, manufacturers of Ultra-Vest (Multi-Vest) or dental investment, that the composition of Ultra-Vest is 60% calcined silica; 30% plaster; and 10% control chemicals. The company is further alleged to have stated that dental investment was not the correct description of the material. The correct alternative description is averred to have been either Cement Refractories per Schedule B 662.2230, or Fire Ground Clay per Schedule B 662.3205.

Respondent argues that the material shipped is not classifiable under Export Declaration Schedule B Commodity Numbers. Moreover the claim, as a request for an adjustment of freight charges based on an alleged error in description, should have been presented to the carrier in writing before the shipment left the carrier's custody[4]. Respondent further argues that even the complainant does not seem to know how to describe the commodity. At various times complainant refers to it as casting refractories; clay fire ground; and Ultra-Vest Jewelry Investment. Respondent also notes that the directions for using Ultra-Vest Jewelry Investment make no reference to using fire of heat-furnace or oven equipment and thus do not support the contention that the material is a fire clay or a refractory mix.

Procedurally, section 22 of The Shipping Act, 1916, 46 U.S.C. 821, requires that complaints must be filed within two years from the time the cause of action accrues in order to enter an award of reparation[5]. The cause of action accrues at the time of shipment or payment of the freight, whichever is later[6]. In the situation here presented, the bill of lading is marked "Freight to be Prepaid in USA On Board." The Freight was paid by check dated October 17, 1974. Moreover, it is settled that claims filed within two years of accrual of the cause of action cannot be barred by tariff regulations imposing a shorter time limitation. The Commission has held:

> . . . once a claim has been finally denied by a carrier, the shipper may still seek and in a proper case recover reparation before the Commission at any time within two years of the alleged injury, and this is true whether the claim has been denied by the carrier on the merits or on the basis of a time limitation rule.[7]

The claim therefore has been filed within limitations.

With regard to the burden of proof, it is also settled that the test is

[4] Rule 3. *Claims For Adjustment In Freight Charges*. 4th. Revised Page 20, Effective date June 8, 1974. Aforementioned tariff of rates.

[5] *Reliance Motor Car Co.* v. *G.L.T.C.*, 1 U.S.M.C. 794 (1939).

[6] *Rohm & Haas Co.* v. *Seatrain Lines, Inc.*, 73-51, Order 10/16/73, and *Aleutian Homes, Inc.* v. *Coatwise Line et al.*, 5 F.M.B. 602 (1959).

[7] *Proposed Rule—Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298 (1969).

what the claimant can prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. But where the carrier is thereby prevented from verifying the claimant's contentions, the claimant has a heavy burden of proof to establish his claim.[8]. Furthermore, in its Report on Remand[9], the Commission has added:

> In considering claims involving disputes as to the nature of the cargo (either weight, measurement or description), if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on the complainant. Nothing in the Court's opinion in *Kraft* should change this.

The presentation yields very little that might be relied upon to identify the character of this commodity. However resort to definitions and usage offer an insight into the nature of this material.

Refractory material is defined as that which is capable of enduring high temperature such as clay, brick, or mortar. Again refractory material is more particularly described as any of various non-metallic ceramic substances that are characterized especially by their suitability for use as structural materials at high temperatures usually in contact with metals, slags, glass, or other corrosive materials (as in furnaces, crucibles, or saggers) that are classified chemically as acid (as silica and fireclay), basic (as magnesite and dolomite), or neutral (as high-alumina refractories, carbon, and silicon carbide), and that are produced in the form of brick, castable concretes, plastics, and granular materials in bulk[10].

Investment casting is described as the method used for reproducing faithfully delicate and intricate detail. Briefly two techniques are traditionally used. The lost wax and the sand process methods. In the sand process, which is involved here, the mold is made by applying to the pattern a very fine damp French sand composed of clay, silica and alumina, which hardens when it dries[11].

The Ransom & Randolph Company apparently has improved the traditional method of applying the sand to the model by the introduction of the use of combined vacuum and vibration which facilitates investment by their product. The company describes Ultra-Vest Investment as a specially blended compound for the jewelry casting industry. It was designed to be mixed with water to give a smooth, easy-to-handle slurry at a very low rise under vacuum. In relevant part the instruction specifies:

> Remove bowl from mixer and place on vacuum table and vacuum until the investment rises in bowl and collapses . . . fill flasks by pouring investment down the side of the flask, allowing the investment to flow up and around and through the patterns . . . Fill flasks with investment to a height which completely covers the top of the patterns. Place invested flasks under vacuum and vacuum for one and a half to two minutes. While

[8] *Western Publishing Co., Inc.* v. *Hapag Lloyd A. G.*, 283(I), 13 SRR 16 (1972).

[9] Docket No. 73-44—*Kraft Foods* v. *Moore-McCormack Lines, Inc.*, 11/24/76, Report on Remand in accordance with the decision of the Court in *Kraft Foods* v. *Federal Maritime Commission*, U.S.App.D.C. , 538 F. 2d 445 (1976).

[10] Webster's Third New International Dictionary, Unabridged, 1967 Edition.

[11] Encyclopaedia Britannica, 1973 Edition.

under vacuum, the flasks should be vibrated to help release air bubbles from the surface of the patterns. This vibration should be continued for a few seconds after the vacuum has been released. This will allow the investment to flow back around the pattern. The flasks are filled to the top and vibrated to level off the investment. The complete investing cycle should take eight to nine minutes.

Combining definitions and usage a description of this commodity may be fashioned. It is concluded that it is a refractory material because it is a non-metallic ceramic substance (60% calcined silica; 30% plaster; and 10% control chemicals), classifiable chemically as an acid (as silica), and produced in the form of a finely ground powder suitable for use in forming molds by investment casting.

This refractory material must next be classified in relation to the specific commodity descriptions existing in the applicable tariff of rates at the time of shipment. The only specific commodity description closely resembled by this shipment is refractory mixes, plastic or castable[12]. There is no rate for "fire ground clay"[13].

Accordingly, reparation in the amount of $1,079.50 is awarded[14].

(S) JAMES S. ONETO,
Settlement Officer.

[12] REFRACTORY MIXES, PLASTIC or CASTABLE and BAFFLE or RAMMING MIXTURES W/M $59.50, Rate Item 22, 26th Revised Page 158, Effective date June 1, 1974.

[13] Fire ground clays or variants thereof as described under Schedule B commodity numbers established by the United States Customs Service are not the commodity descriptions controlling in this matter. It is the commodity description and rate on file with this agency at the time of shipment. The rate for CLAY, FIRE—SEE BRICKS, FIRE, 8th. Revised Page 93, and 10th. Revised Page 84, Effective dates May 10, and June 17, 1974, of the aforementioned tariff of rates is patently inapplicable.

[14] 15.8 × $59.50 = $940.1. $940.1 + $113.40 Bunker SC ($10/Ton) = $1,053.50. $2.133.00 − $1,053.50 = $1,079.50.